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80

A. 19. 134.

Jur.

L.L. OW .U.K.
100

M. 135.

REPORTS
OF
CASES IN BANKRUPTCY,

DECIDED BY
THE LORD CHANCELLOR
COTTENHAM,
AND
THE COURT OF REVIEW.

BY
BASIL MONTAGU AND EDWARD CHITTY, Esquires,
BARRISTERS AT LAW.

WITH
A DIGEST
OF THE CASES REPORTED IN THIS VOLUME,
AND OF
THE CONTEMPORARY CASES RELATING TO BANKRUPTCY
DECIDED IN ALL THE OTHER COURTS.

2.

LONDON:
HENRY BUTTERWORTH,
LAW BOOKSELLER AND PUBLISHER,
7, FLEET-STREET;
AND MILLIKEN AND SON, DUBLIN.

1840.



LONDON :
Printed by A. STOTTISWOODE,
New-Street-Square.

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CASES

IN

BANKRUPTCY.

In the matter of HENRY ALEXANDER DOUGLAS,
a bankrupt.

SPECIAL CASE upon the APPEAL of TOMSON HANKEY,
of Mincing Lane in the City of London,
Merchant, HENRY CHEAPE, of Abchurch
Lane in the said City, Merchant, WILLIAM
PENNELL, of Basinghall Street in the said
City, the creditors and the official assignee
of the estate and effects of the above-named
bankrupt against the order of the Court of
Review made in the matter of this bankruptcy,
dated the 25th day of July 1837.

THE bankrupt, for several years prior to and at the
time of his bankruptcy, carried on business in London
in partnership with *John Anderson* and *Samuel Anderson*,
under the firm of *Douglas, Anderson, and Company*, and
other persons carried on business at Singapore in the
East Indies, under the firm of *Douglas, M'Kenzie, and
Company*.

that there was sufficient privity to entitle *B.* to recover the bills from them, although *M.*
and *Co.* were indebted to *A.* and *Co.* at the time.

L. C.
July 25,
August 3,
1838.

M. and *Co.*,
abroad, through
the agency of
A. and *Co.*,
procure *B.* to
consign them
goods. *M.* and
Co. remit to *A.*
and *Co.* bills,
specifically ap-
propriating
them to pay *B.*,
and also write to
B. to say they
have done so.

Before payment
A. and *Co.* be-
came bankrupt.
—Held, that as
the original
transaction was
through the
agency of *A.*
and *Co.*, they
must be con-
sidered as agents
throughout the
transaction, and

CASES IN BANKRUPTCY.

1838.
 In the matter
 of
 DOUGLAS.

In June 1835 a society or company at Ghent, in the province of East Flanders, called "La Société de l'Industrie Cotonniere," upon the recommendation and through the agency of *Douglas, Anderson*, and Company, consigned to *Douglas, M'Kenzie*, and Company eighty-nine bales of goods for sale or barter on the society's account. Such goods were sent through *Douglas, Anderson*, and Company as the agents of the said society, and their shipping and other charges against the society in respect of this transaction amounted to 81*l.* 7*s.* 8*d.*

On the 8th day of December 1836 separate fiats in bankruptcy were issued against the said *Henry Alexander Douglas* and the said *John Anderson*, under which they were duly declared bankrupts; and the appellants are the creditors assignees and the official assignee under the fiat against the said *Henry Alexander Douglas*. Under this fiat the joint estate of *Douglas, Anderson*, and Company is administered, by virtue of an order of the Court of Review, dated the 12th day of December 1836.

In December 1836 *James Clegg* and *Edmund Clegg* of Watling Street, London, were duly appointed by the said society their agents in this country in respect of the matters in question; and on the 28th of January 1837 a letter was written by the said appellant *William Pennell*, addressed to the directors of the said society, and sent to the said *James Clegg* and *Edmund Clegg* as their agents, of which the following is a copy:—

" Re *Douglas, Anderson*, and Co.

" Basinghall Street, London,
 28th January 1837.

" Gentlemen,

" I beg to acquaint you that Messrs. *Douglas, M'Kenzie*, and Co. of Singapore have written to the late firm of *Douglas, Anderson*, and Co. of this city, requesting them

CASES IN BANKRUPTCY.

3

to remit you a sum of 1,204*l.* 5*s.* 7*d.* on account of a consignment of ninety bales of frieze goods. In consequence of the bankruptcy of the latter, to whom *Douglas, M'Kenzie*, and Company are largely indebted, such request cannot be complied with, and you will have to look to the house at Singapore for a settlement of your account.

1836.
—
In the matter
of
DOUGLAS.

" I am, Gentlemen,
Your most obedient servant,
William Pennell, Official assignee."

On the 15th of June 1837 the said *James Clegg* and *Edmund Clegg* received from *William Pennell*, in an envelope, a letter from *Douglas, M'Kenzie*, and Company to the said society, dated the 31st December 1836 (such letter being one of the eleven letters mentioned in a letter from *Douglas, M'Kenzie*, and Company to *Douglas, Anderson*, and Company herein-after set forth), of which the following is a copy:—

" Duplicate. (Original per *Layton*.)

" Messrs. La Société de l'Industrie
Cotonniere, Ghent.

" Singapore, 31st December 1836.

" Gentlemen,

" We confirm our last respects of the 20th instant per *Hersey*, and now beg leave to advise you that we have this day remitted you in full through Messrs. *Douglas, Anderson*, and Company, London, viz.

Bills at thirty days sight, 4 <i>s.</i> 6 <i>d.</i> ex.	£52	19	2
Bills at six months sight, 4 <i>s.</i> 7 <i>d.</i> ex.	667	5	7½
Ditto, 4 <i>s.</i> 8 <i>d.</i> - - -	769	14	4

£1,489 19 1½

which we hope you will find correct. You will observe that part of the sales are not yet due; but we have in

CASES IN BANKRUPTCY.

1838. this instance been enabled to purchase bills on England
 at a credit of two and three months, and were desirous
 In the matter of seeing your account closed, as our establishment
 of Douglas. here ceases after this date.

“ We remain, Gentlemen,
 Your most obedient servants,
 S^t, pro *Douglas, M^cKenzie, and Co.*
W. F. Lorrain.”

The said *James Clegg* and *Edmund Clegg*, as the agents of the said society, having applied for an inspection of the letters and particulars of the remittances received by the assignees from *Douglas, M^cKenzie, and Company*, relating to the said society, without having been able to obtain the same, they, together with the directors and proprietors of the said society, presented a petition to the Court of Review, praying that the assignees of the estate and effects of the said bankrupt might forthwith be ordered to deliver up to them the said *James Clegg* and *Edmund Clegg*, as the agents for the said society, the several bills of exchange received by them from the said Messrs. *Douglas, M^cKenzie, and Company*, or the proceeds thereof if due and paid, the said *James Clegg* and *Edmund Clegg* being ready thereupon to pay for and on behalf of the said society to the assignees the sum of 81*l.* 7*s.* 8*d.*, the amount of the aforesaid charges for shipping, &c.; and that, if necessary, proper inquiries might be directed, to ascertain whether any other or further remittances had been received by the assignees from the said *Douglas, M^cKenzie, and Company* in respect of the goods so consigned to them by the said society, and that the costs of and incidental upon the application might be paid out of the bankrupt's estate.

By an order of the Court of Review, on the 18th July 1837, the assignees were ordered forthwith to

permit the petitioners, their solicitors and agent, to inspect and take copies, at their own expense, of all bills received by the bankrupt, or by the assignees or any other persons, from *Douglas, M'Kenzie, and Company*, referred to in the petition, and of all correspondence between the parties relative to such bills or the matters in the said petition; and it was further ordered, that the said assignees should not in the meantime part with the funds in question.

1838.
In the matter
of
DOUGLAS.

In pursuance of the last-mentioned order the said *William Pennell* produced three letters from *Douglas, M'Kenzie, and Co.* to *Douglas, Anderson, and Company*, dated respectively 24th August 1836, 17th September 1836, and 31st December 1836, and the bills mentioned or referred to in such letters; all which had been severally received by the appellants as the assignees of the said *Henry Alexander Douglas*, the bankrupt, subsequent to the 8th December 1836, the date of the fiat against him, at which time none of them had arrived in this country.

The following are copies of the said three letters:—

“ Messrs. *Douglas, Anderson, and Co.*, London.

“ Dear Sirs, “ Singapore, 24th August 1836.

“ We confirm our last respects of 12th and 13th ult. per *Elutha*, and are since without any of your esteemed favours. We beg to enclose the following drafts, viz.

Isaac F. Smith, on *Baring Brothers*

and Co. at mos. - - - £1,000 0 0

Thomas Dent and Co., Canton, on *T.*

Dent and Co., London - - 189 16 5

Shaw, Whitehead, and Co., on *Nicol*,

Duckworth, and Co. - - 161 6 9

£1,351 3 2

CASES IN BANKRUPTCY.

1838.	" And will thank you to pay the following sums at		
In the matter of DOUGLAS.	same sight, viz.		
	To <i>Muir, Brown, and Co.</i> , Glasgow	£68	17 9
	<i>D. Morrison and Co.</i> - - -	24	16 3
	<i>G. and W. M'Lellan</i> - - -	79	10 6½
	<i>D. Gilchrist and Co.</i> - - -	180	0 0
	<i>John Ridgway and Co.</i> , Staffordshire		
	Potteries - - -	108	8 2½
		£461 12 9	

" By the Vanguard, to sail in about eight days hence, we hope to hand you further remittances, along with instructions to what parties the same shall be paid.

" We remain, dear Sirs,

Your most obedient servants,

S^d, pro *Douglas, M'Kenzie, and Co.*,
W. F. Lorrain.

" 3d not to hand from China.

S^d, pro *D., M., and Co.*
W. F. L."

" Messrs. *Douglas, Anderson, and Co.*, London.

" Singapore, 17th Sept. 1836.

" Dear Sirs,

" We confirm our last respects of the 24th ult., and have since to hand your esteemed favour of the 14th April, by which we are happy to observe such a favourable report on our shipments of tortoise shells, per Hero, and we have now the pleasure to enclose further remittances, viz.

CASES IN BANKRUPTCY.

7

<i>Douglas Brothers and Co.</i> , four drafts					1838.
and ass ^t to order for 250 <i>l.</i> on your good					
selves, @ 4 <i>s.</i> 5 <i>d.</i> ex. (H. 4528. 30)	£1,000	0	0		In the matter
Nine navy bills, @ 3 and 10 mos. @ 4 <i>s.</i> 4 <i>d.</i>					of
ex. (942. 82)	-	-	-	-	DOUGLAS.
				204	5
				7	
				£1,204	5
				7	

“ Which amount we will thank you to pay over to the Belgian Company, being remittance to account against their consignment to us of ninety bales of frieze goods. We shall also thank you to pay the said company 889*l.* 10*s.* 5*d.*, which we remitted you in our last, @ 4*s.* 6*d.* ex. We are, dear Sirs,

Yours faithfully,

S^d, pro *Douglas, M^cKenzie and Co.*

W. F. Lorrain.

“ Enclosure. Statements of Europe consignments in store.”

“ Messrs. *Douglas, Anderson, and Co.*

“ Dear Sirs, “ Singapore, 31st Dec. 1836.

“ We beg leave to enclose the following bills :—

Sydney Government Bill @ 30 p ^t	-	£52	19	2
<i>Rodgers</i> on <i>Baring Brothers and Co.</i> ,				
6 m. p ^t	-	-	-	-
		266	11	7
<i>Robert Douglas</i> on your good selves 6 m ^t		440	14	0
<i>Freeman</i> on <i>Curling, Young, and Co.</i>	-	386	1	1½
<i>Neilson</i> on <i>Thiggin and Co.</i>	-	783	14	4
<i>Paterson and Co.</i> on <i>Henderson and Co.</i> ,				
four bills at 500 <i>l.</i>	-	-	-	-
		2,000	0	0
Ditto <i>T. Shields and Co.</i> , two bills 500 <i>l.</i>				
and 583 <i>l.</i> 17 <i>s.</i> 9 <i>d.</i>	-	-	-	-
		1,083	17	9
Ditto	-	ditto	-	-
		310	10	2
		£5,284	8	2

CASES IN BANKRUPTCY.

1838. " The above bills are belonging to and for account
 In the matter of pose of the following parties, and we will thank you to dis-
 of pose of the same as follows, viz.
 DOUGLAS. To the Belgian Company, the three first-named bills,

amounting to - - - - £720 4 9½

The remaining bills are at the ex-
 change of 4s. 8d. P. H., to be dis-
 posed of as follows :

To the Belgian Company	-	-	769	14	4
Barton and Guestier, Bordeaux	-	-	91	5	10
Bernard Phelan do.	-	-	110	1	2½
Daniel Gilchrist and Co., Glasgow	-	-	906	5	0
To Muir, Brown, and Co.	-	-	1,267	10	2
M ^r Donald and M ^r Kay	-	-	583	6	8
Donald, Campbell, and Co.	-	-	57	1	0
James M ^r Lellan, Manchester	-	-	322	9	4
Cotterill, Hill, and Co., Walsall	-	-	734	16	6
Thomas Baird and Son, Liverpool	-	-	280	0	0
C. Loganc do.	-	-	33	2	8
			£5,875	17	6

" We enclose eleven letters for the above parties, which, after perusal, we shall thank you to forward. You will observe by the above that we have overdrawn by 591l. 9s. 4d.; but the balance of our late adventures of produce to your consignment will more than cover the said amount.

" The cargo per Margaret has no doubt realized a good profit. All Europe consignments are now remitted for, with the exception of Messrs. *Macdonald* and *Mackay*, whose goods are all disposed of, and whose account sales we are now preparing, and shall, if possible, hand the same to-day along with further remittance.

" We remain, dear Sirs,

Your most obedient servants,
 S^d, pro *Douglas, M^rKenzie, and Co.*,
W. F. Lorrain."

The nine navy bills mentioned in the letter of 17th of September 1836, and the bills on the Sydney Góvernment and on *Baring* Brothers, mentioned in the letter of the 31st December 1836, and all the other bills remitted as aforesaid to *Douglas, Anderson, and Co.*, (except the bills drawn by *Douglas* Brothers and *Robert Douglas*,) were specially indorsed by *Douglas, M^cKenzie, and Co.*, and thereby made payable to *Douglas, Anderson, and Co.*; and the four bills, amounting together to 1,000*L.*, mentioned in the said letter, and the bill of *Robert Douglas* were drawn upon the said firm of *Douglas, Anderson, and Co.*, for which it was not proved that any consideration was given, and such bills were never accepted.

1838.
—
In the matter
of
DOUGLAS.

The petition was heard on the 25th day of July 1837 before the Court of Review; who, being of opinion that such remittances had been made to *Douglas, Anderson, and Co.* to be specially appropriated by them to the said society, ordered that the said assignees should forthwith deliver up or pay to the said *James Clegg* and *Edmund Clegg*, as the agents for and on behalf of the said society, the several bills received by them from the said Messrs. *Douglas, M^cKenzie, and Co.*, or the proceeds thereof to the same amount respectively, as follows:—the three bills mentioned in the letter of the 24th day of August 1836, or the part proceeds thereof to the amount of the sum of 889*L.* 10*s.* 5*d.*, mentioned in the letter of the 17th of September 1836; likewise the four drafts or bills, each for 250*L.*, mentioned in the same letter of 17th of September 1836; and the nine navy bills in the same letter, amounting together to the sum of 204*L.* 5*s.* 7*d.*, — the said two last-mentioned sums making together the sum of 1,204*L.* 5*s.* 7*d.*; also the three bills first mentioned in the letter of the 31st December 1836, amounting together to the sum of 720*L.* 4*s.* 9½*d.*, and the

1838. further sum of 769*l.* 14*s.* 4*d.* out of the proceeds of the remaining bills mentioned in the same letter, less so much of the sum of 591*l.* 9*s.* 4*d.*, also mentioned in the said letter, as the said sum of 769*l.* 14*s.* 4*d.* bears in proportion thereto with the sums therein directed to be paid to the other persons named therein, according to the respective amounts set opposite to their respective names; the company by their said counsel thereby undertaking to submit to such order (if any) as the Court may think fit to make on the application of the said Messrs. *Douglas, M'Kenzie*, and Co. relating thereto; and it was ordered that the costs of the said respondents, the assignees, of and occasioned by the said application, should be paid out of the general estate of the said bankrupts, such costs being first taxed and ascertained by the proper officer of the said Court.

—
In the matter
of
DOUGLAS.

Russell and Bethell for the appellants:—Although the bills were remitted for the Belgian house, yet there was no assent either on their part nor by *Douglas, Anderson*, and Co.; and *Douglas, M'Kenzie*, and Co. being indebted to *Douglas, Anderson*, and Co., the latter have a right to retain them against their debt. No action of trover nor for money had and received could be maintained by the Belgian house against *Douglas, Anderson*, and Co. (a) As to the first sum remitted, if *Douglas, Anderson*, and Co. had become bankrupts and were indebted to *Douglas, M'Kenzie*, and Co., the latter could have done no more than prove for the amount. Nothing that has transpired between the parties can give the Belgian house any lien on these particular bills. (b) The first remittance to *Douglas, Anderson*, and Co. was not accompanied by any direction to pay

(a) *Williams v. Everett*, 14 *East*, 582.

(b) *Scott v. Porcher*, 3 *Mer.* 652; *ex parte Heywood*, 2 *Rose*, 355; *Wedlake v. Hurley*, 1 *Crompt. & J.* 83; *Grant v. Austen*, 3 *Pri.* 58.

the Belgian house out of any particular fund, but was merely general, to pay certain debts; and even if part of the general amount were appropriated specifically to them, still there remained a balance then unappropriated, as to which *Douglas, M'Kenzie*, and Co. were entitled to credit, subject to and depending on the state of accounts between the two houses, *Douglas, M'Kenzie*, and Co. and *Douglas, Anderson*, and Co.; and therefore, and as *Douglas, M'Kenzie*, and Co. were debtors on the balance of accounts to *Douglas, Anderson*, and Co., the latter had a right to repudiate any payment to the Belgian house, and retain it towards a liquidation of their own debts. The second letter brought indeed a direction to pay specifically to the Belgian house, but *Douglas, Anderson*, and Co. were then bankrupts. It amounted to no more than the remittance of a mass of bills to the credit of *Douglas, M'Kenzie*, and Co.; and *Douglas, Anderson*, and Co. were to make certain payments out of the proceeds. No case of appropriation can arise unless by the express act of the consignor; then there must be an assent thereto by the consignee, and a promise by him to the creditor to whose use the remittance is made. Appropriation must be under such circumstances as will cause a discharge between the consignor and the creditor; so that if a loss happen, it must fall on the creditor. (a) In this case the Court of Review had no jurisdiction to make the order appealed from. *Douglas, M'Kenzie*, and Co. being out of the jurisdiction and utter strangers to the bankruptcy, the Court ought not to have exercised such power as they have done over them as affects their rights to have the bills restored to them. The Belgian house is also an utter stranger to the bankruptcy, and

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(a) *Williams v. Everett*, 14 East, 582.

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 ——— getting it back again, in case *Douglas, M'Kenzie, and Co.*
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Swanston, Wigram, and K. Parker for the respondents, the Belgian house:—The Court of Review proceeded on the ground of agency,—that *Douglas, Anderson, and Co.* were alike agents for *Douglas, M'Kenzie, and Co.* and for the Belgian house: all the letters show such agency. The debt arose through their agency, and payment was intended by the like means. In *Williams v. Everett* there was no agency; the transaction was between perfect strangers, who had had no anterior connexion or communication concerning it. This case comes precisely within those of *Bailey v. Calverwell* (a) and *Lilly v. Hays* (b), especially the dictum of *Patteson, J.*, in the latter. There is no case where a party receiving money to pay a debt, he having negotiated the origin of the transaction, has not been held to be agent for the creditor. Try the question by the mode in which the several parties stand related to each other; 1stly, as between *Douglas, Anderson, and Co.*, and *Douglas, M'Kenzie, and Co.*; 2ndly, as between *Douglas, Anderson, and Co.*, and the Belgian house; and 3rdly, as between the Belgian house and *Douglas, M'Kenzie, and Co.* As between the first two parties, if the money had been previously in the hands of *Douglas, M'Kenzie, and Co.*, and then they had given an order upon *Douglas, Anderson, and Co.* to appropriate it, it is clear they might have said, we appropriate it to payment of our own debt to a third party. All the cases go to show that the middle party has no property in the fund remitted, especially also *Buchanan v. Findlay*. (c)

(a) 8 *Barn. & C.* 448.

(b) 5 *Adol. & Ell.* 548.

(c) 9 *Barn. & C.* 738.

If *Douglas, Anderson, and Co.* had paid it to the Belgian house, that would have been a good discharge of the former without any order of the Court, notwithstanding the bankruptcy. Here the Court has ordered this to be done, which operates as a further discharge, if any other were wanting; and why, therefore, do *Douglas, Anderson, and Co.* appeal? They can have no possible interest in so doing. Secondly, as between *Douglas, Anderson, and Co.* and the Belgian house; in all the cases cited by the appellants there was a want of privity between the consignee and the creditor, and therefore there was no right of action. In this case there is direct privity arising out of the antecedent dealings between them in this particular transaction, and it is within the case of *De Bernales v. Fuller*, mentioned in the note to *Williams v. Everett*. (a) The Courts will lay hold of the slightest circumstances to find agency and privity, especially where justice must ensue. Here no accounts were ever opened between the Belgian house and *Douglas, M'Kenzie, and Co.* Thirdly, as between the Belgian house and *Douglas, M'Kenzie, and Co., Douglas, Anderson, and Co.* were mere stakeholders. All the letters show an express assignment and specific appropriation to the Belgian house through the hands of *Douglas, Anderson, and Co.*; and *Douglas, M'Kenzie, and Co.* had no power of revoking the authority, because it was an authority coupled with an interest in the Belgian house. (b) The Court of Review have done justice to all parties, because the balance of accounts between *Douglas, M'Kenzie, and Co.* and the Belgian house has always remained in favour of the latter.

Russell replied.

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(a) 14 *East*, 590.

(b) *Ex parte South*, 3 *Swan*. 392; *Gausson v. Morton*, 10 *Barn. & C.* 731.

1838. LORD CHANCELLOR:—The special case states that
 In the matter the bankrupts were agents for the Ghent house, for the
 of purpose of the shipment of the goods; they had a charge
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 the 24th August 1836 *Douglas, M'Kenzie*, and Co. send
 to *Douglas, Anderson*, and Co. bills amounting to
 1,351*l.* 3*s.* 2*d.*, with directions to make certain pay-
 ments, altogether about 461*l.* 12*s.* 9*d.*; leaving therefore
 a balance of 889*l.* 10*s.* 8*d.*, and stating that they should
 shortly send further remittances, with instructions to
 what parties the same were to be paid. Accordingly,
 on the 17th September 1836 they remit to the bank-
 rupts drafts on themselves equal to 1,000*l.*, and nine
 navy bills equal to 204*l.* 5*s.* 7*d.*, which they desire
 them to “pay over to the Belgian company, being
 remittances on account against their consignments to
 us of ninety bales of frieze goods. We shall also thank
 you to pay to the said company 889*l.* 10*s.* 5*d.*, which
 we remitted you in our last.” On the 31st December
 1836 they sent many other bills, and after enumerating
 several they say, “The above bills are belonging to
 and for the account of the following parties, and we will
 thank you to dispose of the same as follows: viz. to the
 Belgian company the three first-named bills, amounting
 to 720*l.* 4*s.* 9½*d.* The remaining bills are to be disposed
 of as follows: to the Belgian company, 769*l.* 14*s.* 4*d.*,”
 and after appropriating the others they say, “We
 enclose eleven letters for the above parties, which, after
 perusal, we shall thank you to forward.” Of these
 eleven letters one was to the Belgian house of the same
 date, the 31st December, stating, “We advise you that
 we have this day remitted you in full through Messrs.
 Douglas, Anderson, and Co.,” and then it enumerates the
 bills as stated in the last letter, and observes, that part
 of the sales were not due, but they had procured bills

on England, as they were desirous of seeing their account closed. Here it is to be observed that *Douglas, M^cKenzie*, and Co. had received the goods of the Ghent house through the bankrupts; they therefore seem to be the agents of the house, and by their letter of the 17th September they remit certain bills and drafts for that house, and direct them to pay the balance, of which, by the letter of 24th August, they had reserved to themselves the right to direct the application. The remittance of 31st December is still stronger, because the bankrupts at the time they received it also received the letter to the Ghent house, in which *Douglas, M^cKenzie*, and Co. tell the Ghent house that the remittance is to them through the bankrupt house, and the letter to the bankrupts directs them specifically to appropriate and pay certain bills to the Ghent house. It remains to be seen whether under the circumstances the Ghent house has acquired the right to these remittances. That the bankrupt estate has not any right to them is clear: they are remittances for particular purposes and with specific declarations; and if the party receiving them had been conclusively the agent of the remitters, he could only have the choice of carrying the instructions into effect or returning the money to the remitter. He could not have kept it for the purpose of discharging any debt due to him by the remitter. (a) The remittances in this case were not received till after the bankruptcy. The assignees, therefore, who are the appellants, have no interest in the question, and the order of the Court of Review perhaps unnecessarily reserved any question on behalf of *Douglas, M^cKenzie*, and Co. It is clear the remitter could never dispute the application of the remittances according to his

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(a) *Buchanan v. Findlay*, 9 B. & C. 738.

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directions, unless he had recalled the authority before the directions were effected, even in cases in which he has power so to do, and in this case there has been no such attempt to recall the direction; but what power have *Douglas, M'Kenzie*, and Co. to alter the destination of those remittances? *Everett v. Williams* and other cases, proceeding upon the same principle, were relied upon by the appellants; but they only prove that a party, for payment to whom money is remitted to an agent of the remitter, has no right of action against such agent unless the agent has done some act to create a contract between himself and the party to be paid. And how little will be sufficient for that purpose appears from the case of *Lilly v. Hays* (a); and the cases of *De Bernales v. Fuller*, *Williams v. Everett* (b), and *Bailey v. Calvernoell* (c) show that the rule is confined to cases in which the holder of the property is strictly the agent of the remitter, and that circumstances much slighter than those in this case will give to the party to whom payment was intended a claim upon the fund. In the first case *De Bernales*, the holder of the bill, had no personal communication with *Fuller*, who received the money from the acceptor for payment of the bill; but, as Lord *Ellenborough* explains the case in *Williams v. Everett*, *Fuller* was considered as the agent for *De Bernales*, because, the bill being to be paid at the bankrupt's house, he had received it from *De Bernales*, banker, with whom it had been placed for the purpose of receiving payment; so that *Fuller*, being clearly the agent of the acceptor, from whom he received the money, and having, by possessing himself of the bill, constituted himself agent for the holder, was held liable to pay the

(a) 5 *Ad. & Ell.* 548.

(b) 14 *East*, 590.

(c) 8 *B. & C.* 448.

amount to the holder. In *Bailey v. Culverwell*, the goods had become the property of the purchaser, and the brokers who had been the agents for the sale held them for him, and their duty to the seller was discharged; but the acceptor of the bill given in payment having become bankrupt, the broker applied to the purchaser for further security, and he then directed them to sell the goods, and pay the bill; and their direction was held to give the original seller a right to have the bill paid out of the proceeds of the goods, although there was no evidence of his having been at all privy to the transaction, upon the ground that the brokers were to be considered as his agents. In this case the bankrupts were agents for the Ghent house for the purpose, at all events, of the shipment. *Douglas, M'Kenzie, and Co.* received the goods through them; but they corresponded with the Ghent house, and naturally remitted the proceeds to them through the same channel, describing the bills remitted in the letter of the 31st December, as belonging to the Ghent house. It appears to me that the bankrupts were not merely the agents of the remitter, as in *Williams v. Everett*, but that there was quite sufficient to constitute such a privity between them and the party to whom the payment was to be made to entitle that party to claim the remittances within the authority of the cases to which I have referred; and that the decision of the Court of Review was correct, and the appellants must pay the costs of this appeal.

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Judgment of the Court of Review affirmed,
and appeal dismissed, with costs.

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1. The certificate will be allowed, if the petition to stay it, charging the assignees with fraud in obtaining the allowance, is not served on the assignees.

2. In the case of an unsettled account, the certificate will not be stayed if the assignees swear that, in their belief, the balance is against the claimant, and it does not appear that he has done every thing that by him ought to be done to fix the balance.

3. The Court ought to exercise a discretion as to the certificate, upon which it decides, not ministerially, but judicially.

Per Sir J. Cross.—If the claimant has endeavoured to have the balance struck, and the assignees collude with the bankrupt, the certificate ought to be stayed. *Per Sir J. Cross.*—If the certificate do not disclose that it was signed after the last examination, it is defective. *Per Sir J. Cross.*—But the Court can send it back to the Commissioners to be set right. A creditor has no right to object to a certificate on the ground of such informality. *Per Sir G. Rose.*—Costs given on dismissing a petition to stay certificate, though one of the judges differed in opinion from the rest of the Court.

4. Three partners, one becomes bankrupt, another petitions to stay certificate, and to have accounts taken as between him and the bankrupt. *Per Sir G. Rose.*—The third partner must be served with the petition.

THIS was a petition to stay the bankrupt's certificate, and praying that the assignees might be ordered to deliver to the petitioner the particulars of a debt claimed to be due from him to the estate, and that a balance might be struck between the petitioner and the assignees, to enable the petitioner to prove his debt; and it also prayed that certain debts which had been paid subsequent to proof might be expunged.

The grounds upon which the petition proceeded were:—1st, that there was a large unascertained balance due to the petitioner; 2d, that the certificate had been signed by various creditors whose debts had been paid, and ought to have been expunged; and, 3dly, that certain debts, which the petitioner had paid as surety for the bankrupt subsequent to proof, had been expunged without notice to him, and that he ought to have had the benefit of those proofs.

The facts appearing upon the petition were as follow:

The fiat issued on the 10th of February 1837.

From January to December 1836 the petitioner, the bankrupt, and one *Henry Gilbard*, had been in partnership as lime burners, coal and iron merchants at Cotehill. The partnership was dissolved on the 20th of December 1836. After the dissolution, the partnership stock in trade and effects, together with the partnership books, remained in the possession of the bankrupt, on his pro-

mise to account for the same, in order that he might make up the partnership accounts.

The petition then stated that the accounts of the partnership were never taken, although repeated applications had been made to the bankrupt for the purpose; but that he had not made up the accounts, or accounted with the petitioner, or *Henry Gilbard*, for the partnership effects, although of very considerable value; and that the partnership books and accounts had since been taken by the messenger, and were in the custody of the assignees or their solicitor.

That frequent applications had been made by the petitioner and the said *Henry Gilbard* to the solicitor of the assignees, to deliver up the possession of the partnership books, without effect; and that the petitioner, together with the said *Henry Gilbard*, had, since the bankruptcy, been sued for and paid divers large sums of money on account of the partnership; and that the bankrupt, by reason of such payments and advances, became largely indebted to the petitioner.

The petition further stated, that the bankrupt, for several years prior to and down to the date of the fiat, was also largely interested in mines, of which he had taken, in several instances, the original leases or sets, and as lessee thereof had appropriated to the petitioner divers shares and interests therein, which were afterwards carried on by the petitioner with the bankrupt and divers other persons as co-adventurers; and that the petitioner had also, as co-adventurer in several of such mines, bought, with the bankrupt and other persons, divers other shares, and again sold the same, and by reason thereof had extensive money transactions and dealings with the bankrupt, all of which the petitioner, in or about the month of November 1836, rested and balanced, and delivered to the bankrupt a

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debtor and creditor account thereof, showing a balance then due from the petitioner to the bankrupt of 505*l.* 11*s.* 6*d.*; which account the said bankrupt having sometime kept in his possession, and examined, afterwards, in or about the latter end of December 1836, returned to the petitioner approved; and the petitioner in two places signed his name at the foot of the account, in testimony of such approval, as follows:—
 “ This account admitted, *Thomas May, J. Malachy* ;”
 and, “ admitted, *J. Malachy* ; admitted, *Thomas May* .”

That subsequent to the account being so rested and signed by *Joseph Malachy*, and in addition to the debt due from the bankrupt in respect of the Cotehill partnership, the petitioner paid and advanced for and on account of the bankrupt and made himself responsible by becoming a party to several bills of exchange to a very considerable amount, with the particulars of which he had supplied the assignees; and on a debtor and creditor account thereof, after deducting 150*l.* 0*s.* 3*d.* and 429*l.* 10*s.* charged in error to the bankrupt, the balance due to the petitioner would amount to the sum of 2,224*l.* 13*s.*

That on the 24th March last the Western District Banking Company proved a debt of 578*l.* 7*s.* 9*d.*, in which was included a bill of exchange, dated the 22d May 1837, for 317*l.* 16*s.* 6*d.*, on which the petitioner was liable as surety for the bankrupt; and that *John Hicks* proved a debt of 913*l.*, and *Thomas Gill* proved a debt of 76*l.* 3*s.* 11*d.*, under the fiat; and on the 19th April last Messrs. *Harris* and Company of Plymouth, bankers, proved a debt of 1,196*l.* 7*s.* 4*d.* on three bills drawn by the petitioner on and accepted by the bankrupt.

That on the 27th March last *Thomas Gill* was fully paid the debt of 76*l.* 3*s.* 11*d.* so proved against the

bankrupt, for which the petitioner was also liable; and on the 26th June last the bill for 317*l.* 16*s.* 6*d.*, part of the debt proved as aforesaid of 578*l.* 7*s.* 9*d.*, was paid by the petitioner to *George Hawtayne*, and the remainder of the debt the petitioner believed had been also paid by *Henry English*, the party liable thereto; and on the 1st August last *John Hicks* was paid 100*l.* 6*s.* 5*d.*, being that part of his proof for 913*l.* for which the petitioner was liable; and on the 29th August last the petitioner also paid to Messrs. *Harris* and Company upwards of 1,200*l.* in discharge of their debt proved under the fiat, for which the petitioner was liable to them as the drawer of the bills of exchange as aforesaid.

That on the 11th September last the assignees convened a private meeting of the commissioners acting under the fiat, of which the petitioner had no knowledge whatever, for the purpose of expunging the said proof of the debt made by Messrs. *Harris* and Co., who had refused to concur with the other creditors in signing the bankrupt's certificate; and immediately afterwards held another private meeting, and signed the bankrupt's certificate, which was now before the Court for confirmation.

That by the debts so proved by *George Hawtayne*, *Thomas Gill*, and *John Hicks*, who had signed the certificate, not having been expunged, although paid altogether or in part, and by Messrs. *Harris* and Co.'s debt being so expunged as aforesaid, without the petitioner having the opportunity of including the debt paid by him to Messrs. *Harris* and Co., and proving same in the balance due to him as aforesaid, the consent of four fifths in number and value of the bankrupt's creditors was obtained, which could not have been effected without the petitioner's concurrence and consent, had he been

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able to prove for the debt, which on a balance of accounts with the bankrupt was justly due and owing to the petitioner. The petition prayed that the allowance and confirmation of the said bankrupt's certificate might be stayed; that the assignees might deliver to the petitioner particulars of the account claimed by them from the petitioner; that a balance might be struck, in order that the petitioner might prove his debt under the fiat, and be at liberty to assent to or dissent from the allowance of the bankrupt's certificate; that the debts and parts of debts so proved under the fiat, and paid before the signing of the certificate by the commissioners acting thereunder, might be expunged, and for that purpose that the certificate might be sent back to the commissioners in the fiat named, to re-certify.

On the case being called on, the Court inquired whether the assignees had been served, and it appearing that they had not,

Mr. *Bethell* and Mr. *Bacon*, for the bankrupt, contended that the petition must stand over, in order to rectify that mistake; but that according to the universal practice of the Court the bankrupt would be entitled to his certificate as of course.

Mr. *Swanston* and Mr. *Russell* for the petitioner :—
 The assignees are not necessary parties to the hearing of that portion of the petition which affects the certificate. It is not a mere accident or slip that has occasioned the non-service on them, but the advice of counsel that such a course was proper. If we make out that there is an unsettled account subsisting between the bankrupt and the petitioner, and the probability of a balance being found in our favour, it will give us a right to have the certificate stayed, in order to afford

an opportunity of ascertaining the balance. We ask nothing against the assignees upon which the stay of the certificate turns.

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ERSKINE C. J. — How can you proceed without having the assignees before the Court? You must make out a case of fraud against the bankrupt, and therefore that the certificate has been unduly signed, or else that the delay in striking a balance in the accounts between him and the petitioner has arisen from the acts of the bankrupt. Now, assuming your whole statement in the petition to be true, you only make out a case of fraud against the assignees. It was they who convened the meeting, and so managed the proofs as to get the appearance of the requisite number to sign the certificate, and not the bankrupt; for although fraud or improper conduct used by any party to obtain a certificate might be a sufficient ground to stay it, yet it is impossible we can take it for granted that such acts have been committed, in the absence of the party charged therewith; and whatever delay has occurred in striking a balance since issuing the commission, there is nothing to show that it arose by the procuration of the bankrupt.

Mr. *Swanston* and Mr. *Russell*:—

We say that the signature of the certificate was fraudulently obtained; no matter by whom; and it having been so, it is equally a fraud on the part of the bankrupt to come here for its confirmation, and therefore it should be refused. It is quite enough for us to show that there is an unascertained balance between the bankrupt and his former partner. In *ex parte Hadley* (a) the certificate was stayed, upon the petition of the partner of the bankrupt, until the partnership

(a) 1 *Gl. & J.* 193.

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accounts should be taken, no want of due diligence being imputable to the petitioner. But when the Court looks at the circumstances under which this certificate passed the hands of the commissioners, no doubt can remain as to the propriety of staying its confirmation. In order to remove the obstacle which the refusal of *Harris* and Co. to sign interposed, the assignees finding that the petitioner had paid that debt, immediately, without any notice to the petitioner, expunged their proof, although the petitioner then became absolute owner of the proof, and of all the incidents thereof, as surety for the bankrupt, who was the acceptor of the bill. He had acquired a right to the benefit of that proof, and the assignees could not justify expunging it without first giving notice. It was not an accommodation bill, or the case would have been different. The assignees ought to have presumed that as drawer he became surety, and as such entitled to the benefit of the proof already on the proceedings. Immediately after, however, on the same day, we find the commissioners sign the certificate.

The expedient of expunging not having however yielded them four fifths in number and value, we find they had retained proofs on the proceedings, although the debts, or part of them, in respect of which the proofs were made, had been previously paid by the petitioner; and by procuring the signature of the quondam creditors to the certificate they attain their object; although it is manifest that the party paying the debt, and not the party paid, had the option whether he should sign or not. (a)

As to the unsettled state of accounts, the petitioner swears, that when properly taken, there will be found

(a) 6 G. 4. c. 16. s. 52.

2,224*l.* due to him from the bankrupt. The bankrupt by his affidavit admits 598*l.* to be due to petitioner on one of their transactions, and seeks to repel the charge of the 2,224*l.* being due to petitioner, by stating that up to the date of the fiat a very large balance, 17,665*l.*, was due from the petitioner on an account made up by him. The petitioner denies that there was any settled account. He has done all in his power to get a balance properly struck, but in vain. A suit was commenced for the purpose of taking the partnership accounts, but by the intervention of the bankruptcy it has become defective, and the petitioner is thereby prevented from putting in his answer. In *ex parte Johnson* (a) the bankrupt swore positively, that on taking the accounts there would be a balance in his favour, and the petitioner neglected to swear that it was the other way; and therefore the Lord Chancellor refused to stay the certificate. In this case that *ratio decidendi* does not apply, because the petitioner swears to a balance. [ERSKINE C. J.:—You do not make out any case that the bankrupt prevented the accounts being taken, which was the ground upon which *ex parte Hadley* (b) was decided. The bankrupt in that case was a defaulting party.] The ground of that decision was quite the other way, as the margin of the report shows; namely, that the petitioner was in no default. In fact, we state that numerous applications to account have been addressed to the bankrupt, in vain; and that might be sufficient to show that he caused the existing state of circumstances. But, denuded of that, we say that the conduct of the bankrupt need have nothing to do with it. It is enough to show that, without any default on his part, the petitioner has not had an opportunity of proving. There is, however, a fatal objection to this

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(a) 1 *Atk.* 81. See 1 *M. & A.*, Digest, 539. (b) 1 *G. & J.* 193.

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certificate: it does not show the date of the last examination, and *non constat* but that the signatures might have been attached previous thereto.

Mr. Bethell and Mr. Bacon:—

The course to be adopted by a party coming to stay a certificate is well recognized. The party, in a case like the present, must, amongst other things, show that a balance is due to him sufficient to turn the certificate; *ex parte Skipp* (a): that he has attempted to prove, or at least has entered or tendered a claim; *ex parte Smyth*, and *ex parte Whitchurch* (b); or else he must show that the bankrupt has caused the delay in coming to a settlement of accounts. The petitioner comes here *quā* creditor, but his character as such is yet unestablished, and it is utterly impossible that this Court can find him to be one, unless the assignees are before the Court to dispute or admit his right. The petitioner has neither entered a claim, nor has he on his own showing even attempted to do so; still less has he proved. It is true, he could not go in to prove, because the balance was unascertained; but he had it in his power to go in and tender his proof, and demand to have a claim entered.

Mr. Swanston in reply:—

There is no denial in the respondents affidavits that the balance is otherwise than an unsettled one. That alone entitles the petitioner to stay the certificate. With regard to the objection, that we have not tendered proof or claim, it is open to this observation, that, from the affidavit of the assignees (who, though not served, have volunteered to assist the bankrupt's case), it is obvious

(a) 1 *Dea. & Ch.* 497.

(b) 1 *G. & J.* 195; *id.* 72.

that a tender would have been useless, inasmuch as they so arranged matters, without a proper account being taken, as to induce the commissioners to find the debt of 17,665*l.* to be due from the petitioner to the bankrupt; under which circumstances, had a tender of proof or claim been made, it would have been instantly rejected by the commissioners; and as to the difficulty of directing the taking of the accounts in the absence of the assignees, the order of the Court can easily provide for that.

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ERSKINE, C. J.:—

I am of opinion that the petitioner has not established a sufficient case to warrant our granting the prayer of this petition. He puts his right to stay the certificate upon three grounds. 1st, That there is a large unascertained balance due to him, which he has had no opportunity of settling; and he seeks to have the accounts between him and the bankrupt taken, and to prove for the amount, and to be at liberty to exercise his discretion over the certificate; 2d, that certain creditors have signed the certificate, whose debts, being paid, ought to have been expunged; and, 3dly, that debts for which he is a surety, and therefore has the right to the benefit of proof, have been expunged improperly, so as to deprive him of a voice in signing the certificate. As to the two latter objections, the petitioner does not pretend that if the proofs were set right on the proceedings, as he desires, it would be sufficient to turn the certificate, unless in addition thereto the balance he claims on the unsettled accounts were ascertained to be in his favour, and thrown into the scale. It is not the bankrupt who has committed the alleged fraud, according to the petitioner's own showing, but the assignees; and it is manifest, that before we can enter

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into the question of the propriety of expunging or replacing the proofs the assignees must be before the Court. The bankrupt is not implicated in the fraud, and therefore, as between him and the petitioner and this Court, there is no ground in this respect to stay the certificate. I admit that fraud committed by others might be a sufficient reason for staying a certificate, if that fraud were fully established. But how can we in this case, behind the back of the assignees, who are charged as the delinquents, determine whether fraud has been resorted to or not? In the absence of those parties it is impossible to proceed, and therefore the second and third objections must fall to the ground.

As to the first, it is disputed whether a balance in favour of the petitioner exists or not. The assignees swear they believe it will turn out the other way. At all events there is enough to render it extremely doubtful. A party coming to stay the certificate on this ground should at least show that every proper means have been resorted to to procure the taking of the accounts, or else that he has been delayed in so doing by the acts of the bankrupt. *Ex parte Hadley* turned upon the conduct of the bankrupt, though the case shows that the petitioner used all due diligence. It would have been indeed wrong to give to the bankrupt the advantage of his own laches. If the present petition were granted it would very properly be looked on as a precedent for staying the certificate in all cases of unsettled account, which would induce a manifest injustice. Here there is not evidence of a single step being taken by the petitioner to get a balance struck, except a demand made on the assignees, which he knew would not be complied with. It does not appear that he ever called on the commissioners to allow even a claim to be entered; while, on the contrary, the assignees

swear that they have done all they could to bring the matter to an issue. I think the certificate must therefore go.

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Sir *John Cross* : —

In my humble judgment the Court ought always to exercise a discretionary power, whether it is fit and proper to stay a certificate. This Court sits here judicially to determine such matters, and not with mere ministerial functions to see that the requisites of the certificate have been observed. The first objection to this petition is, that the assignees have not been served, and that in their absence a creditor cannot be heard in support of a claim to stay the certificate on the ground of unsettled accounts and an unascertained balance between him and the bankrupt. I am of opinion that this is no objection. It seems to me that in *ex parte Hadley* the assignees were not brought before the Court; for the prayer of the petition was silent as to proof. But without considering it as an abstract question, I think there is enough in the present case to justify our proceeding as though they had been *de facto* here. They were aware of the pendency of this petition, and might have appeared; and they have sworn affidavits in opposition, and we may regard them as brought here by the bankrupt. As to the facts of this case, I think they are quite sufficient to induce the Court to pause. If the petition be to any extent true there have been dealings to an enormous extent between the petitioner and the bankrupt, and the debt due to the former, as he puts it, is as large as that of all the other creditors put together. Applications have often been made to the bankrupt before the bankruptcy, and to his assignees since, to come to a settlement of their mutual accounts. The books have been demanded, and at least the

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respondents might have invited the petitioner to an inspection of them. Instead of rendering accounts as they ought, the assignees examine the petitioner as a debtor to the estate in a hostile manner, and it would have been in that state of things vain and useless for him to have applied for the entry of a claim. To my mind it is very evident that the bankrupt and his assignees are colluding together to prevent the petitioner enjoying his right of assenting or dissenting to the allowance of the certificate; and when all the facts of the case are considered, the Court ought to pause before it confirms the certificate. It is merely asked to stay it; and I think that at least ought to be granted.

I also think the certificate itself is defective. For aught we can see it may have been signed before the bankrupt passed his last examination. The date thereof ought to appear on the face of it.

Sir George Rose : —

As to the objection of the form of the certificate, the petitioner has nothing to do with it. The Court is to look for such requisites, and finding the absence of them, may, if it thinks fit, send the certificate back to the commissioners, in order that the informality may be set right. There is no rule better known, or more strictly, and properly too, adhered to, than that, unless a petitioner to stay a certificate comes to the hearing fully prepared at every point, the certificate must go. Here is a prayer before us that accounts may be taken, to the which the assignees are necessary parties, and they are not served. This, in my mind, is a decided objection to staying the certificate. The present is simply a question of proof, and does not hinge on the conduct of the bankrupt. Even had the bankrupt anticipated the present hearing by a counter petition,

stating the want of service on the assignees of the petition now before us, the Court would have been bound to grant him his certificate *instantly*. But it has been said in this case that the certificate has been obtained by fraud, and in proof of that charge it is stated that the petitioner was the drawer of a bill which was proved, and was afterwards expunged behind the back of the petitioner. There is no allegation that the bankrupt was a party to or even knew of that proceeding. But suppose it had been otherwise; there is no fraud in that. The bill was paid, and the assignees did right to expunge. The petitioner, who paid the bill as drawer, might or might not be a surety, and so have a right to retain the proof. It might or might not have been a mere accommodation bill, and the petitioner might have been primarily liable. So it can hardly be called a fraud, to have expunged the proof when the bill was paid. It is not so clear either that a surety would have any right to interfere with the certificate. I know of no case where such right has been acknowledged. (a) But the petitioner puts it, that if the debt had remained on the proceedings, the balance, with that, would have constituted him creditor to an amount sufficient to turn the certificate; but he nowhere swears to his belief as to any precise amount of balance due to him; and on the other side he is met by an affidavit showing the balance to be the other way; and therefore, in that way of looking at it, I do not think the petitioner has made out his case.

The absence of the assignees is another decided objection; but supposing they were here, there is still another party necessary to the taking of these accounts,

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(a) See *ex parte Rogers*, 4 Dea. & Ch. 623. S. C. 2 M. & A. 153. in which that point is touched upon.

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namely, *Gilbard*, the third partner. He also ought to have been served: for it is necessary that the Court should somehow or other have gained jurisdiction over him, in order to bind him by the result of the accounts when taken. Moreover, there is no statement in the petition that the solvent partners have paid all the partnership debts, nor does it contain any offer of indemnity to the bankrupt's estate; indeed there actually appears a debt proved against this estate, due from the petitioner, a part only of which the petitioner states he has paid.

Under all these circumstances we must dismiss this petition, and with costs, notwithstanding the difference of opinion in the minds of the Court.

Petition dismissed, with costs.

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Ex parte HAINES. — In the matter of JOHN BARNETT the elder and JOHN BARNETT the younger.

When the creditor of the principal is sole assignee under a commission against the surety, and petitions for sale of the mortgaged property, a person must be appointed to protect the interests of the creditors of the surety.

THE petitioner was the acting public officer of a joint stock banking company, called the Bank of Birmingham.

John Barnett the elder was a customer of the bank, and in the month of May 1833 was largely indebted to them upon his banking account.

On the 8th of May 1833 *John Barnett* the elder deposited with the bank the title deeds of some freehold property at Birmingham Heath, of which he was seised in fee; and, by an agreement in writing between them, it was declared that such title deeds were so deposited as a security to the bank for the debt then due, and for

any sum of money which might become due to them from *John Barnett* the elder, on the balance of his account, and for any bills of exchange or promissory notes bearing his name, which were then or might be in the hands of the bank, not exceeding the sum of 1,200*L*; and it was also declared, that the sum then due or to become due from *John Barnett* the elder to the bank should be a charge on the said freehold premises.

Shortly previous to the 10th of December 1835 the bank called upon *John Barnett* the elder for further security for payment of what was then or might thereafter become due from him to them.

On the 10th of December 1835 *John Barnett* the younger gave to the bank a guarantee for the payment of what then was or might thereafter become due to them from *John Barnett* the elder.

Subsequent to this transaction, and before the 8th of February 1836, *John Barnett* the elder, at the request of the bank, and in order the better to secure the payment by him of the debt then due or which thereafter might become due from him to the bank on the balance of his banking account, not exceeding the sum of 5,000*L*, deposited with them two several indentures of demise of certain property in the county of Warwick, dated the 30th of May 1834 and the 27th of July 1835, and a counterpart of an indenture dated the 31st of December 1834, being an underlease of part of the property comprised in the indenture of the 30th of May 1834.

Previously to and at the time of the deposit of the last-mentioned deeds with the bank, *John Barnett* the elder had agreed with *John Barnett* the younger for the sale to him of his the said *John Barnett* the elder's estate and interest in the premises comprised in the said

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indentures of the 20th of January 1831, the 30th of May 1834, and the 27th of July 1835; and therefore, upon the occasion of the last-mentioned deposit with the bank, an agreement in writing, dated the 8th of February 1836, was made between *John Barnett* the younger of the first part, *John Barnett* the elder of the second part, and the trustees of the bank of Birmingham of the third part, whereby it was recited, that, in consideration of the said bank having then already advanced large sums of money to *John Barnett* the elder in his banking account with them, and having consented to continue his account, that as an inducement to them so to do the said *John Barnett* the younger declared and agreed that the said indentures of the 30th of May 1834 and the 27th of July 1835, the right, title, and interest of the said *John Barnett* the elder in and under such leases having been, as therein stated, contracted to be assigned by the said *John Barnett* the elder to the said *John Barnett* the younger, and also the other indenture of the 31st of December 1834, should be, and that the same indentures were, upon the execution thereof, deposited with the said bank, as a security for the repayment to the said bank of all sum and sums of money which then was or thereafter should be due from the said *John Barnett* the elder to the said bank, upon his banking account, or upon any of the accounts particularized in a certain agreement or guarantee of the said *John Barnett* the younger, dated the 10th of December then last past; and the said *John Barnett* the elder and *John Barnett* the younger thereby severally declared and agreed, to and with the trustees of the said bank, that the aforesaid indenture dated the 20th of January 1831 (the right, title, and interest, subject only to the claim of the said bank thereon, having been, as therein stated, agreed to be conveyed by the said *John Barnett* the

elder to the said *John Barnett* the younger,) should remain in the custody of the said bank, for the like purposes as are therein declared concerning the said leasehold deeds; and as a further security to the bank, the said *John Barnett* the younger thereby also agreed that counterparts of all leases of the said premises, when granted, and also certain deeds and evidences of title relating to certain freehold hereditaments in George Street, Birmingham, conveyed or then about to be conveyed to the said *John Barnett* the younger, should, as soon as completed, be deposited in the custody of the bank, and should be subject in every respect to this agreement, and the provisions therein contained, on the part of the said *John Barnett* the younger, so far as the same could be applicable thereto; and the said *John Barnett* the younger and *John Barnett* the elder thereby agreed to execute, upon demand, to the trustees of the bank, good and valid mortgages of the said leasehold premises and of the freehold hereditaments, free from all incumbrances, excepting any underleases which might be granted thereout, and to deduce good and marketable titles to the premises; and the said *John Barnett* the younger also agreed, that all expenses incident to the said mortgages and the deduction of the said titles, and to the agreement, should be borne and paid by him, and that the mortgages should be prepared by the bank, and should contain powers or trusts for sale, and all other provisions and conditions usual in mortgages of the like nature; and it was thereby agreed, that in the meantime, and until the mortgages should be made and executed, the agreement should create a good and valid lien or charge upon the premises to the extent of a sum not exceeding at any time, from time to time, the sum of 5,000*l*.

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On the 12th day of November 1836 it was agreed between *John Barnett* the elder, *John Barnett* the younger, and *James Pearson*, as manager and on the behalf of the bank, that 1,000*l.* should be raised by mortgage of the premises comprised in the indentures of the 30th May 1834 and the 31st December 1834, and should be applied in part payment of the money then owing to the said bank by *John Barnett* the elder; and it was also agreed, that, subject to the title of the intended mortgagee in respect of the 1,000*l.*, and the interest thereof, the deeds and premises should be charged with the payment unto the bank of the money from time to time owing by *John Barnett* the elder, on the balance of his banking account, not exceeding 5,000*l.* And in order to enable *John Barnett* the elder and *John Barnett* the younger to raise the 1,000*l.*, the bank delivered unto them the indentures of the 30th May 1834 and the 31st December 1834, for the purpose of being delivered to the mortgagee, subject to whose mortgage the bank were to retain their security.

In pursuance of this agreement, the 1,000*l.* was raised by way of mortgage on the premises comprised in the indentures of 30th May 1834 and the 31st December 1834, and the premises were assigned and those deeds delivered to *Paul Moore* the mortgagee, as a security for the sum and interest.

Messrs. *Stubbs* and *Rollings*, the solicitors of the bank, prepared the draft of a charge to the bank on the deeds and premises comprised in the said indentures of the 30th day of May 1834 and the 31st day of December 1834, subject to the mortgage of 1,000*l.* charged thereon to Mr. *Moore*, and on the 4th January 1837 forwarded the same to *Barnett* the elder, for his perusal and approval; and they also sent with such draft a letter as follows:—

“ Sir,

“ ‘Yourself and the bank.’ According to your request we send you the draft of a further charge on the premises in mortgage to Mr. *Moore*, instead of sending it to Messrs. *Lee* and *Hunt*. We will thank you to peruse it, and let us have it immediately, in order that it may be executed.”

The draft was, on the 6th of January 1837, returned to the said Messrs. *Stubbs* and *Rollings*, accompanied by a letter from *Barnett* the elder, as follows:—

“ To the Directors of the Bank of Birmingham.

“ Gentlemen,

“ When you consented to let me have the leasehold writings as to property in Reservoir Lane, in order to mortgage the same to Mr. *Paul Moore* for 1,000*l.* and interest, I distinctly stated to you that it was my intention to sell the premises; and that whatever monies were coming to me, after payment of the principal, interest, and all expenses, should be paid by me to your bank; and I beg to repeat that from that intention I have never varied for a moment; I shall abide thereby. In order to satisfy you that such is my intention, I have requested Mr. *Eyre Lee* to attest my signature to this letter.”

Relying upon the said letter, the bank did not press for the immediate execution of any instrument charging the premises mortgaged to *Moore* with the money then due to the bank by *Barnett* the elder on the balance of his banking account.

Moore was informed of the securities of the bank, and that it was the intention of the bank, and *Barnett* the elder and *Barnett* the younger, that the bank should relinquish their lien on the indentures of the 30th May 1834 and the 31st December 1834, and their equitable

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charge on the premises therein comprised, only so far as might be necessary for the purpose of securing the 1,000*l.* and interest.

On the 10th April 1838 a fiat issued against *John Barnett* the younger, and the petitioner was appointed sole assignee; and on the 16th April 1838 a fiat issued against *John Barnett* the elder.

At the date of the fiat against *John Barnett* the elder he was indebted to the bank in the sum of 3,656*l.* 10*s.* 11*d.*

The petition, after stating the above facts, prayed a reference to the commissioners under the fiat against *Barnett* the elder to take an account of all monies due to the bank from *Barnett* the elder, and for a sale of all the estate and interest of both the bankrupts in the premises comprised in the said several indentures, and that the monies to arise from the sale might be applied in the usual manner, with leave to prove for the deficiency under the said fiat against *Barnett* the elder.

Mr. *J. Russell* and Mr. *J. E. Armstrong* for the petitioner.

Mr. *Swanston* for the respondent.

ERSKINE, C.J.:—*Barnett* the younger is a party to the arrangement, and appears to have an interest in the property in question. Ought he not to have been brought here?

Mr. *Russell*:—There is no interest remaining in him. The petitioner, as assignee under the fiat against him, takes all such interest as he had in the property in question, and is therefore competent to ask for the present order, and to bind his bankrupt by the effect of it. As assignee, he is competent to consent that such

interest as he had should be dealt with as prayed, for the benefit of the bank.

Per Curiam.—It is impossible to conceal that *Barnett* the younger has an interest in the question before us, of which his creditors have an option to avail themselves, if they think fit. The petitioner, though assignee, and as such representing the body of creditors, has no interest, except to get this order for the benefit of the bank. Various questions may arise as to the bills, as between the two estates of the elder and younger *Barnett*, and among others it may also be insisted that the mortgage discharged the suretyship. The Court cannot be assured by the consent of the party whose private interest it is to get the order prayed for that the creditors at large are willing such an order should be made.

Ordered, That the petition should stand over, in order to call a meeting of the creditors of *Barnett* the younger, to institute an enquiry as to the interest which he had, and to appoint persons, in the nature of assignees, to protect such interest as was found to exist. The petitioner not to interfere in such meeting or choice.

Ex parte ELLIS.—In the matter of GRIGG.

MR. O. ANDERDON applied that a town fiat might issue instead of one directed to a country fiat commissioner at Gosport, upon an affidavit, that out of thirty creditors, twenty-eight, whose debts amounted to 2,754*l.*, and who resided in London, were anxious to have the application granted. The total amount of debts did not appear.

in the first instance by the petitioning creditor, to be recouped out of the estate.

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London fiat,
instead of at
Gosport, issuable when large
majority of the
creditors reside
in London.
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Nov. 6. The subject was afterwards mentioned by Mr. *Anderdon* to the Lord Chancellor, who directed that the petitioning creditor should pay the costs in the first instance only, to be reimbursed out of the estate.

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Upon an application by a bankrupt to be re-examined, the re-examination will be ordered, and, if there are funds, the costs to be paid out of the estate.

In the matter of CROSSLEY.

THIS was an application by the bankrupt, praying that he might be brought up from York Castle to Huddersfield, to be re-examined before the commissioners at the costs of his estate, and also for his discharge from custody. It appeared that he had been brought up twice before, but had been remanded, and had since remained in custody for the last eighteen months. He had also been twice indicted for perjury and concealment of his effects, but was now desirous of giving a more satisfactory account of his estate and conduct. His assignees had 2,000*l.* of his estate in hand, and he swore that he had no pecuniary means of causing himself to be brought up.

The Court, under the circumstances, ordered that he should be brought up before the commissioners, and the costs be borne by the estate, but could not enter into the question as to his discharge.

Mr. *Swanston* for the petition. (a)

(a) See *Rex v. Jackson*, 1 T.R. 654; *ex parte Graham*, 2 Bro. C.C. 48; *ex parte Bardwell*, 1 Mont. & Agr. 193; *Turner v. Hibbert*, id. 243. See as to witness, *ex parte Baxter*, 8 Barn. & Cres. 344; *Mont. & M.* 16.

Ex parte BOUSFIELD. — In the matter of
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MR. BOUSFIELD was one of the deputy registrars of the Court of Bankruptcy. His salary was payable quarterly, and had been received by him up to the 11th April 1838. On the 19th of May following he resigned his office, and subsequently took the benefit of the Insolvent Debtors Act. By the 1 & 2 W. 4. c. 56. s. 50., under which the appointment to the office had been made, it is enacted, that if any person for the time being holding the said office should resign the same, he should be entitled to receive such proportionable part of his salary as should have accrued during the time that such person should have executed his office since the last payment. *Mr. Bousfield* had executed the duties of his office until he resigned. The sum of 62*l.* 8*s.* 5*d.* had accrued due to him between the 11th of April and the 19th of May 1838, the day of his resignation. Application having been made by *Mr. Bousfield* to the Accountant in Bankruptcy for payment to him of the said sum of 62*l.* 8*s.* 5*d.*, but he having declined to pay the money on the ground that it belonged to the assignee under the insolvency,—

Upon the resignation of a registrar who has taken the benefit of the Insolvent Act, the Court of Review will not order the payment of arrears of salary to the registrar, upon the refusal of the insolvent assignee to receive it.

Mr. Twiss applied for a declaration from this Court that *Mr. Bousfield* was entitled to the money, the assignees under the insolvency having refused to receive it, and that the accountant might be directed to pay it over to him.

Sir John Cross: — This Court cannot interfere. If there had been any dispute between two officers of this Court the matter might very properly have been addressed to it; but this is not the case here.

Application refused.

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PROMOTIONS.

The Right Honourable *Thomas Erskine*, the Chief Judge of the Court of Review, having been appointed one of the Judges of the Court of Common Pleas, Sir *J. Cross* and Sir *G. Rose* sat in his absence.

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In the matter of HADDON.

An application for appropriation of funds under a separate fiat need not stand over because a subsequent joint fiat has issued, under which a petition to supersede the separate fiat is pending.

MR. PIGGOTT, on this case being called on, applied that the petition might stand over.

The petition prayed that certain funds might be set apart for the petitioners, as a separate fiat had issued against the bankrupt; and after this petition was presented a joint fiat issued, and a petition was pending to supersede this separate fiat. He therefore asked that the present petition might stand over till the result of the petition to supersede was known.

Sir *G. Rose*:—One fiat we presume must be good. The order to be made on the present petition is quite independent of the result of the petition to supersede; and if we make any order under the existing fiat, its being subsequently superseded in favour of a joint fiat can in nowise affect it. The circumstances therefore afford no ground for delaying the present petition.

Ex parte ANN RICHARDSON. — In the matter of
CHRISTOPHER RICHARDSON.

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MR. RICHARDSON, the bankrupt, was one of the original shareholders in certain mines in Germany. The produce consisted of copper, silver, lead, and iron; and the property in them was transferred by deeds registered in the German courts to three English trustees, for the benefit of thirty-six shareholders.

A casual conversation is sufficient notice to prevent reputed ownership. The Court will restrain assignees from proceeding at law to invalidate transfer of shares by virtue of reputed ownership.

Mr. Richardson applied to his sister, the petitioner, for a loan upon the security of these shares. She consented, and sold 2,000*l.* three per cent. annuities, and paid the proceeds, 1,800*l.*, to her brother, on the 1st of March 1837.

On the same day he delivered to his sister a packet, on which was indorsed, in his own handwriting, the following words: "Shares in the German mines, the property of Miss *Richardson*."

The packet contained the original certificates of the mining shares, and also a receipt for the sum paid by him upon a call on the shares, together with a memorandum in the bankrupt's handwriting, addressed to the petitioner, as follows:

"Limehouse, 1st March 1837.

"My dear Ann,

"The accompanying two shares in the German Mining Company (Nos. 74 and 75), and for which I have this day been offered 2,100*l.*, I deposit with you as a security for the 2,000*l.* three per cent. reduced annuities you have this day placed at my disposal; and I do hereby engage to transfer the said two shares to you, on being requested so to do.

"(Signed) CHRISTOPHER RICHARDSON."

"To Miss Ann Richardson."

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On receiving this packet she put the same, together with other documents belonging to her, into another packet, and sealed the whole up with her seal.

The petition then stated, that the petitioner then proposing a visit to the continent, and being then resident in the house of her said brother, and having no suitable place of deposit for the security of the said packet, delivered the same in its sealed state and condition, with its before-mentioned contents or enclosures, to the said *Christopher Richardson*, for safe custody, requesting him to take charge thereof; which he consented to do, expressing his intention to place the same for that purpose in the iron safe in his counting-house, and which he accordingly did. That the petitioner shortly afterwards visited the continent, and returned home to her said brother's house in the second week in November 1837; shortly after which she requested him to re-deliver the said packet to her, and the said *Christopher Richardson* did accordingly return the said packet to the petitioner, with the seal perfect, unbroken, and in all respects in the same state and condition as when she delivered it to him as aforesaid; and the said certificates, receipt, and letter have ever since been in the possession of the petitioner. That the said German Mining Company was established for the working of mines in the kingdoms of Bavaria and Russia and the grand duchy of Nassau, and was possessed of and interested in various mines or mining properties, or interests and rights of mining, locally situate in those countries, the same being property of an immovable nature or character. That the said mines or mining property have been conveyed to the trustees for the said company, of whom *Bernard Hebel*, thereafter named, was one, being shareholders, their heirs and assigns for ever, in trust for themselves and the other shareholders of the said company, of whom the said

bankrupt was one. That the said company was not of a trading or commercial description, but was to all intents and purposes a mining company. That the shares of the said company were not goods and chattels, but represent the interest of the members in mines or mining property. That it is provided by the deed of the said company that no shares of the said company shall be transferred or assigned without the consent of a board of directors; and that on a transfer being made the original certificate or certificates of the party transferring the same shall be delivered up to the directors to be cancelled, and a new certificate or certificates shall be given to the party to whom such transfer shall be made. That due notice of the said deposit of the said shares, and of the title and interest of the petitioner under the same, was in fact given to the said company and to the board of directors before the said bankruptcy of the said *Christopher Richardson*. That the facts and particulars of the said deposits of the said two shares by the said *Christopher Richardson*, by way of security to the petitioner upon the said loan or advance by her, were afterwards, and a considerable time before the said bankruptcy, distinctly communicated and made known by the said *Christopher Richardson* to the said *Bernard Hebel*, then and still one of the directors of and a trustee as before mentioned for the said company, who was a near connexion of the petitioner, he having married a near relation of her's; and he was and continued from that time to the time of the said bankruptcy perfectly well aware of the petitioner's title and interest in the two mining shares under and by virtue of such deposit. That at a meeting of a board of directors of the said company, at which the said *Bernard Hebel* was present, upon the name of the said *Christopher Richardson*, together with other shareholders, being mentioned by the secretary to the

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said board as not having paid the amount payable under a call upon shares then lately made, the said *Barnard Hebel* then openly stated and made known to the said board, in the hearing of the directors and secretary then present, that the said *Christopher Richardson* had mortgaged his said shares to his sister, Miss *Richardson*, the petitioner; and that the amount of the said call would be paid by her; and which last-mentioned statement was made before the bankruptcy of the said *Christopher Richardson*. That the said assignees, in prosecution of their said claim, have lately expressed their intention and in fact intended to commence some action at law or other proceedings against the petitioner for the recovery of the said certificates of the said shares; and the petitioner was advised that the said assignees ought in the meantime to be restrained, by the order and injunction of this Court, from commencing or prosecuting any such action or other proceedings for the recovery of such certificates.

The petitioner prayed that she might be declared an equitable mortgagee, and that the assignees might be restrained from prosecuting any action for recovery of the certificates.

Mr. *Anderdon*, for the petitioner, stated that this was a clear equitable mortgage, the consideration beyond dispute, the property of the lady in the funds having been sold out and received by the bankrupt. The affidavit of Mr. *Barnard Hebel*, one of the directors, and a personal friend of the family, together with the evidence of the secretary to the company, prove the notice relative to the shares. Mr. *Hebel* deposed that the bankrupt applied to him for a loan, when he advised him to part with his shares, but was told that they were already pledged to the petitioner for 2,000*l.*; that on a subsequent occasion, the day of the bankrupt's insol-

vency, at a meeting of the directors, allusion having been made to arrears of calls due on Mr. *Richardson's* shares, he notified the transfer to the sister, and an inquiry was made by the secretary to know who should be applied to for payment.

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On a *voir dire* examination, Mr. *James*, secretary to the company, stated, upon the examination of Mr. *Anderdon*, that he well remembered the meeting of directors on the morning of the 7th of December, and heard Mr. *Hebeler* mention the mortgage and transfer of shares to Mr. *Richardson's* sister. One of the directors, a creditor, objected to the transfer. The meeting was over about three o'clock; and he believed the declaration of insolvency was filed the same evening.

This witness being examined by the Court stated, that Mr. *Richardson* paid the calls on the shares. Since the bankruptcy they have been paid by the assignees. Mr. *Richardson's* difficulties were the subject of conversation before Mr. *Hebeler's* mention of the deposit of the shares with Miss *Richardson*. His observation was incidental and casual. Had it been a formal notice of transfer he should have made a minute of it, which he had not done. It is the custom in the company to ask leave of the board for transfer of shares. When this is not done the shares are treated as in the hands of the original holders. Such applications were previous to transfer; the board knew nothing of deposits by way of mortgage.

Mr. *Bacon*, on the same side, said that this notice was sufficient, and referred to *Smith v. Smith* (a), *ex parte Harrison* in the matter of *Medley*. (b) By the rules of the company, no transfer of the shares subsequent to that to the petitioner could have been made without

(a) 4 *Tyrw.* 54; S. C. 2 *Crom. Mee. & R.* 231.

(b) 3 *Mont. & Ayr.* 506.

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delivery up of the certificates; and no transfer could have been made by the bankrupt without possession of the certificates, which were in the hands of the petitioner. Before the act of bankruptcy the reputed ownership by the bankrupt had ceased. All that was required in this kind of case was knowledge, and not a formal notice.

Mr. *Swanston* and Mr. *Russell* for the assignees:— Sufficient has not been done to prevent the operation of the clause relating to the reputation of ownership. The certificates were not actually in the petitioner's possession until after the bankruptcy. The alleged notice was a mere casual conversation amongst strangers, without Miss *Richardson's* cognizance (a); and in the case of *Smith v. Smith* (b) the notice was to one of the trustees of private property; and with respect to the allegation in the petition, that this case is not within the statute, as it is in the nature of real property, the answer is obvious; this point was fully discussed, and the law settled, that in cases of this nature the property is personal. *Ex parte Lancaster Canal Company.* (c) This point has lately been under the consideration of the Lord Chancellor relative to property in Scotland (d); and although judgment has not yet been pronounced, the result seems to be clear. (e) And if, as the petitioner

(a) *Ex parte Curtis*, 4 Dea. & Ch. 354.

(b) 4 Tyrw. 54; S.C. 2 Crom. Mee. & R. 231.

(c) *Mont. & Bli.* 94. S.C. 1 Dea. & Ch. 411.

(d) *Ex parte Pollard* in the matter of *Courtney*, heard before the Lord Chancellor, 8th August and 6th November 1838. See this case before the Court of Review, 3 Mont. & Ayr. 340.

(e) See *Smith v. Topping*, 2 Nev. & Man. 421; *Storer v. Hunter*, 3 B. & C. 370; *ex parte Smith, Buck*, 140; *Darby v. Smith*, 8 T.R. 82; *Arbousin v. Williams*, 1 Ryan & M. 74. *sed query.* See *Jones v. Dwyer*, 15 East, 21; *ex parte D'Obree*, 8 Ves. 82; *Wydown's* ca. 11 Ves. 87; *ex parte Dufrene*, 1 Ves. & B. 51; 1 Rose, 333; and *Thomas v. Desanges*, 2 Barn. & Ald. 586.

insists, this is to be considered as real estate, the *lex loci* must be considered, and the German law does not recognize equitable mortgages.

Mr. *Anderdon* was not called on to reply.

Sir *J. Cross*:— Upon the integrity of this case no doubt can be entertained. The petitioner lent the money to her brother, and received what she considered undeniable security. But it is said that sufficient notice was not given. The bankrupt has no power over the shares; and could not transfer them without the certificates. (a) The petitioner had therefore entire dominion over the property; the order and disposition were in her; and the bankrupt could have acquired no property in the certificates, except by the felonious act of breaking the petitioner's seal. This is not like the case of a bond which has been assigned; for there the original creditor might receive the amount due upon it, without its production. Bankruptcy ensued on the 7th of December in the evening, when the declaration of insolvency was filed; but the directors of the Company had knowledge in the morning of that day of the extinction of the reputed ownership. The petitioner is entitled to have the property sold for her benefit, and to become a creditor in the event of a deficiency.

With respect to *ex parte Pollard*, I still entertain the opinion I expressed when it was before this Court; but be that as it may, it very much differs from the present case.

Sir *George Rose*:—I should have deeply regretted if the petitioner could, by non-compliance with any legal requisite, have been deprived of the property upon which she advanced this sum to her brother in his

(a) The bankrupt's actual possession *as custodee* amounted to nothing. (*Bartram v. Payne*, 3 Car. & P. 176.)

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distresses; but there is not any foundation for the objection; the conversation with Mr. *Hebeler* was sufficient notice, even if it had not been mentioned before at the board. Notice, therefore, was given, and what can it signify by whom? Though a bankrupt was up to the ears in insolvency, notice at any fractional period of time before the act of bankruptcy would be sufficient to take the case out of the statute. Order and disposition is always a question of fact, and quite enough appears in this case to show it was not in the bankrupt. If this was to be taken as real property no notice was requisite, the authority having been completed by the writing on the deposit of the certificates. The German law on transfer is not in this case of any effect, this being merely a transfer of documents representing shares of interest in property, and the petitioner only seeking her portion of the profits of real estate, and not the estate itself, as in *ex parte Pollard*. The assignees must be restrained from proceedings at law for the recovery of these shares.

The petitioner declared entitled to relief as prayed, with the costs, there having been a memorandum in writing.

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 Jan. 26,
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If money is entrusted to the treasurer of a friendly society, for which he is to pay interest, and another sum for which he is not to pay interest, and he enter into the statutable bond, as treasurer, for the whole sum, the society, upon the bankruptcy of the treasurer, is entitled to full payment within the 4 & 5 W. 4. c. 40 s. 12., and no part is to be treated as a loan to him in his private character.

Ex parte JAMES RAY and others, members and stewards of the friendly benefit society called "The Liberal Society."—In the matter of MARY WOODLIFFE.

THIS petition stated, that in the year 1792 a friendly benefit society was established at Pontypool, under the name of the "Granby's Head Club," which was some

benefit society, and the petitioner, as treasurer, for the whole sum, the society, upon the bankruptcy of the treasurer, is entitled to full payment within the 4 & 5 W. 4. c. 40 s. 12., and no part is to be treated as a loan to him in his private character.

years afterwards changed to that of "The Liberal Society."

The rules of the society were afterwards inrolled pursuant to the 33 Geo. 3. c. 54. On the 31st of September 1829 *Mary Woodliffe*, the bankrupt, was appointed treasurer of the society, and had then in hand 149*l.* 8*s.* 9*d.*, and out at interest 50*l.*, making together 199*l.* 8*s.* 9*d.* At the time of her appointment the following resolution was entered into:—"It is agreed by the members of the society late of the Granby's Head, now held at the Crown and Anchor Inn in Pontypool, that Miss *Mary Woodliffe* is appointed treasurer to the said society; and that she the said *Mary Woodliffe* is to have a sum of 149*l.* 8*s.* 9*d.*, of which she is to pay interest for 120*l.*" On the 7th of September 1829 the bankrupt entered into the bond prescribed by the statute, with the clerk of the peace, for 300*l.* penalty, as treasurer of the society. (a)

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(a) "Know all men by these presents, that we *Mary Woodliffe* of the town of Pontypool in the county of Monmouth, inn keeper, *Thomas Davis* of the town of Abergavenny in the said county, gent., and *John Potter* of the said town of Pontypool, saddler, are held and firmly bound to *Alexander Jones* esquire, clerk of the peace for the said county of Monmouth, in the penal sum of 300*l.* of good and lawful money of Great Britain, to be paid to the said *Alexander Jones*, or his certain attorney, executors, administrators, or assigns, for which payment to be well and faithfully made we bind ourselves jointly and severally for and in the whole, our heirs, executors, and administrators, and every of them, firmly, by these presents sealed with our seals, dated this seventh day of September, in the tenth year of the reign of our sovereign lord George the Fourth by the grace of God of the united kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1829: Whereas at a grand meeting of the Friendly Society of tradesmen and others, held at the dwelling house of the above-bounden *Mary Woodliffe*, known by the name or sign of the Crown Inn, in the town of

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In February 1835 the society conformed to the provisions of the 10 Geo. 4. c. 56., and the rules thereof were certified by Mr. *Pratt*, the barrister appointed to certify the rules of savings banks, as being in conformity to law, and within the provisions of the last-mentioned statute as amended by the 4 & 5 W. 4. The bankrupt continued in the office of treasurer until November 1837, at which time she became bankrupt. At that time she was in possession of the sum of 153*l.* 4*s.* 10*d.* belonging to the society, as also appeared on reference to the copy of her account current with the society, which account was invariably produced at the several

Pontypool aforesaid, and called the Granby's Head Club, the said *Mary Woodliffe* was duly elected treasurer of the funds of the said society, to manage the same, under the control nevertheless and subject to the direction of the said society, or a standing committee, and conformably to the general rules and regulations of the said society: And whereas by the said rules, and by an act of parliament passed in the tenth year of the reign of his present majesty King George the Fourth, intituled 'An act to consolidate and amend the laws relating to friendly societies,' so to be formed and established, it is ordered and directed that such treasurer shall become bound as therein respectively mentioned with two sufficient sureties for the just and faithful execution of such office. Now the condition of the above-written obligation is

such, that if the said *Mary Woodliffe* shall at the regular meetings of the said society, when thereto requested by the said society or a committee, produce an accurate account of the funds of the said society entrusted to her care, and, at the expiration of her said office, deliver over to her successor elect, or the said society or committee for the time being, all money, vouchers, papers, writings, and accounts whatsoever belonging to the said society, or in anywise relating to the funds thereof come to her hands, then the above-written obligation to be void, or else to remain in full force and virtue.

"*Mary Woodliffe* (L. s.)

"*Thos. Davis* (L. s.)

"*John Potter* (L. s.)

Signed, sealed, and delivered
in the presence of

"*Thos. Baker, Abergavenny.*"

meetings of the society, and signed by her, and which sum of 153*l.* 4*s.* 10*d.* included the 50*l.* so out at interest as aforesaid at the time she became treasurer. By the 4 & 5 W. 4. c. 40. s. 12. it is enacted, "that if any person appointed to any office in a society established under the statute of the 10 Geo. 4. or that act, and being entrusted with the keeping of the accounts, or having in his hands or possession by virtue of his office or employment any monies or effects belonging to such society, shall die or become bankrupt or insolvent, his heirs, executors, administrators, or assigns shall, within forty days after demand in writing, by the order of any such society or committee thereof, or the major part of them, assembled at any meeting thereof, pay out of the estates, assets, or effects of such persons all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, and all such assets, &c. shall be bound to the payment and discharge thereof accordingly." On the 19th of December 1837 demand (ordered by the said society at a meeting specially appointed for that purpose) was made upon each of the assignees of the estate of the bankrupt by Messrs. *Jones* and *Waddington*, who were then the attornies for the society, for payment of the 153*l.* 4*s.* 10*d.* according to the last-mentioned clause in the act of parliament; but the assignees did not comply therewith. At a meeting under the fiat, on the 6th of August last, proof of debt was tendered to the commissioners by the said stewards on behalf of the said society. The commissioners rejected the proof because the society refused to admit that the said *Mary Woodliffe* had not in her hands more than about 29*l.* of the money of the said society as treasurer thereof, (which they offered should be paid in full,) and that she held the remainder of the said sum of

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153*l.* 4*s.* 10*d.* in her individual capacity, and in respect of which they were willing the society should take a dividend *pro rata* with the bankrupt's other creditors; which proposition the petitioners declined to accede to, having been advised that under the circumstances of the case, and the provisions of the said statute 4 & 5 W. 4., they were entitled to the whole of the said sum of 153*l.* 4*s.* 10*d.* By the copy account accompanying the petition, and duly copied from the original cash account, it appeared that the balance in the hands of the bankrupt was constantly fluctuating, there being monthly receipts and weekly disbursements to sick members. The society never held any security for any part of the money in the hands of the bankrupt except the aforesaid bond; and there never was any understanding or arrangement between them that she was to be considered as liable for any specified or particular portion of the fund only, but for the whole, as the treasurer of the society. The prayer was, to be paid the whole amount, 153*l.* 4*s.* 10*d.*

An affidavit in support of the petition further stated, that during the time the bankrupt continued treasurer she received, by virtue of her office, and in pursuance of a notice signed by her in which she described herself as treasurer, and at her request delivered by the deponent to the party indebted in the same, the before-mentioned sum of 50*l.*, which was outstanding at interest at the time of her appointment, and also various other sums belonging to the society, and also made all necessary disbursements on behalf of the society; that the account current was invariably produced at the several meetings of the society, and was signed by the bankrupt. From the accounts it appeared that she was regularly and personally charged with interest on the 120*l.*; and by a resolution, shown by the accounts,

dated 2d of June 1836, it was "resolved by the committee this day, that Miss *Mary Woodliffe* (the bankrupt) is to pay in both principal and interest of all that may be in her hands belonging to this society on the fourth Monday in May 1837; 100*l.* to be paid on the fourth Monday in November 1836, and all the remainder to be paid as above by article."

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Mr. *Swanston* and Mr. *Rolf* for the petition.

Mr. *J. Russell* and Mr. *W. Rose* for the assignees (after referring to the words of the act):—The money now claimed was not in the hands of the bankrupt as treasurer, but as a private loan at interest; and the act never contemplated that benefit societies should have the advantage of claiming such monies in full out of the estate of the bankrupt treasurer. The words of the appointment, the memorandum of June 1836, showing a resolution of the society requiring the treasurer to pay in the money at a given date, and the mode in which the accounts were kept, whereby she charged herself with the interest from time to time, all show that it was not in her hands simply in the character of treasurer. If the money had been in her hands by virtue of her office only, the society would have required payment of interest and principal at once, and not have deferred it till the time mentioned in the resolution of June 1836. In *ex parte Stamford Friendly Society* (a) it is held, that the preference given to these societies is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract, and therefore does not extend to money held by the treasurer upon the security of his

(a) 15 *Ves.* 280. See *ex parte Ashley*, 6 *Ves.* 441; *ex parte Ross*, 6 *Ves.* 304; *ex parte Sunderland*, Cook, B.L. 25.

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promissory note, payable with interest on demand. [Sir *John Cross* :— There the funds of the society were kept in a chest, and the money due was lent out of it to the bankrupt. Sir *George Rose* :—And security was taken; which makes all the difference, as clearly indicating that it was a personal loan.] Lord *Eldon*'s judgment did not rest on either of those points; he says, "The preference is given only in respect of money which got into the hands of officers, independent of contract. The whole of the sum was money in his hands by contract; not upon bond, or any obligation by virtue of his office. My opinion is, that the legislature did not intend that these societies should have the very large remedies given them by this act of parliament, unless the money was dealt with precisely as the act directs. And if, instead of resting upon the security which the legislature gives them, they lend money to one of their officers upon a special contract between him and them, that is a loan to him, and is not to be considered as money in his hands by virtue of his office within this act of parliament. These societies must understand that if they will lend money upon special contract, they have not the remedies which they suppose they have." No decision can be stronger than this in favour of these assignees. Here the money was lent on contract, and not by virtue of office. The security taken is only evidence of the transaction. We make out the contract independent of security. The same doctrine was upheld in *ex parte The Amicable Society of Lancaster*. (a) [Mr. *Swanston* :—There the bankrupt had ceased to be treasurer, and the question could not arise. Here the question is, whether the money was in the hands of the bankrupt as treasurer or not. She continued treasurer

(a) 6 Ves. 98.

till her bankruptcy.] If this money had been in her hands as treasurer she would not have been charged with interest. The payment of interest is evidence of the contract, and is quite equivalent to the taking security.

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RAY
and others.
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of
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Mr. Swanston, in reply, was stopped by the Court.

Sir John Cross:—This is a very clear case; and I am of opinion that the commissioners have done wrong in rejecting this entire claim. By the 10 G. 4. c. 56. s. 20. it is enacted, that if any person appointed to any office by any such society, and being intrusted with or having in his hands by virtue of his office any monies belonging to such society, shall become bankrupt, his assignees shall, within forty days after demand, pay all sums remaining due which such person received by virtue of his office before any other debts are paid." But it is said the bankrupt in this case did not receive such money by virtue of her office; it therefore becomes necessary and material to look to the instrument of her appointment. This shows that the 120*l*., and in fact all the money, got into her hands simultaneously with conferring the office upon her. But still it is said that she received it in her individual capacity. Why then did she give the bond to the clerk of the peace for the entire sum? If it had not all been in her hands as treasurer, she would have been required to give the bond to cover merely the balance short of the 120*l*.. Again, it is said that the circumstance of paying interest takes the case out of the statute, as evidencing contract; but it merely amounts to this, that the money makes interest, which the thirteenth section of the act provided the treasurer shall make. It would have been on her personal security and a loan to her, unless she had given the bond for

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the whole. This is like the case of a banker; if such were appointed treasurer and he allowed interest, could it be said that because he does so he ceases to hold the money *quâ* treasurer? I think not. Therefore the society has a right to be paid in full. I offer no opinion as to the wisdom of the law in this respect, but we must deal with it as we find it.

Sir G. Rose concurred.

Ordered as prayed. (a)

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Jan. 22,
1839.

Ex parte BATE.—In the matter of GOUGH.

If a petition for the sale of an equitable mortgage is rendered necessary from a mistaken view by the assignees of their rights, they can claim costs only out of the bankrupt's general estate.

If parties agree upon an order out of Court, the Court cannot decide the question of costs between them without opening the whole case.

THIS was a petition for the sale of an equitable mortgage.

Mr. *Swanston* for the petition stated, that the petitioner and the respondents had agreed out of Court as to the order to be taken upon this petition, except as to the mode and amount in which the costs were to be paid, which the agreement left for the Court to decide upon.

Mr. *Anderdon*, on behalf of the assignees, proposed that the costs of all parties, as between solicitor and client, should come out of the produce of the sale of mortgaged property, out of which the petition had arisen.

(a) In *Wasney v. Earnshaw*, a loan to the executor, for which 4 Tyrw. 806, it was held, that he is personally liable at law, and where executor agrees with legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes cannot plead *plene administravit* in bar to an action at law by legatee.

Mr. *Swanston* objected to this, as the conduct of the assignees had confessedly rendered the petition necessary.

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Per Curiam:—Unless you can agree it is impossible we can decide; unless we hear the merits of the petition you must construe the agreement between you. It is quite impossible the Court can entertain the question upon the mere agreement. (a)

But the Court intimated that, as the petition was admitted to be rendered necessary by the conduct of the assignees, arising from a mistaken view of their rights, it was clear they could claim nothing beyond costs out of the bankrupt's general estate; and costs as between party and party were eventually given to each party out of their respective funds.

Ex parte RAWLINGS.—In the matter of JONES.

Jan. 22,
1839.

MR. *DEACON* applied that a town fiat might issue in this case instead of a country fiat.

Cor.
Sir J. Cross.

The bankrupt resided at Taunton. The petitioning creditor, whose debt was 200*l.*, resided in London. The total amount of debts was about 2,000*l.*, and creditors to the amount of between 1,200*l.* and 1,300*l.* resided in London. The assets were supposed to be very small, and the act of bankruptcy was under the eighth section of the imprisonment for debt bill; so that no objection could arise as to the evidence in proof of it lying at a distance from London, where it was desirable in other respects that the fiat should be worked.

A London fiat will not be issued against a country trader because the petitioning creditor resides in London, where 1,300*l.* out of 2,000*l.* creditors also reside, and the proof of the act of bankruptcy is more easy and less expensive in London.

(a) See *Forsyth v. Manton*, 5 *Mad.* 78; *Ormonde v. Anderson*, 2 *Ball & B.* 369; *Street v. Rigby*, 6 *Ves.* 821.

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Sir *John Cross* thought that no sufficient grounds were shown why the general rule should be departed from. The main object of the fiat is to discover the estate of the bankrupt; and that could never be so well effected as in his immediate neighbourhood. And as to the expense, it was very doubtful whether that would be lessened, especially as the petitioning creditor would have out of his own pocket in the first instance to bear the costs of bringing up to and maintaining the bankrupt in London.

Motion refused.

C. of R.
Jan. 15,
1839.

Ex parte HITCHCOCK and ROGERS.—In the matter of WILLIAM WORTH and HENRY WORTH.

Upon the formation of a new firm, the separate debt of one of the firm does not, without express agreement, become the joint debt of the new firm.

THE facts appearing on the petition were as follow : In September 1837 *William Worth* carried on business on his separate account at Totness, Devonshire, and was then indebted to the petitioners for goods to the amount of 810*l.* 6*s.* 10*d.* For a part of that debt, on the 1st of September, *William Worth* indorsed to the petitioners three several bills of exchange, all dated 1st of September, and drawn by *William Worth* upon and accepted by his father-in-law *James Reeby*, and payable to *William Worth*; one being for 246*l.* 15*s.* 10*d.* at three months, another for 250*l.* 16*s.* 8*d.* at eight months, and the third for 254*l.* 17*s.* 6*d.* at twelve months, making together 752*l.* 10*s.*; and for the residue of the debt he gave his own acceptance for 57*l.* 16*s.* 10*d.*, payable to the petitioners at six months date. *Henry Worth*, the brother of *William*, carried on business on his separate account at Kingsbridge, Devonshire. The bill for 246*l.* 15*s.* 10*d.* fell due on the 4th of January 1838; but a day or two

previously Mr. *Michelmores* of Totness wrote on behalf of *William Worth* to the petitioners as follows:—

“ I regret to inform you that it will not be in Mr. *William Worth*’s power to meet his acceptance to you for 246*l.* 15*s.* 10*d.*, falling due on the 4th instant. The facts are, that an arrangement has been made for his brother *Henry* to join him as partner in the concern here, and several persons have been in treaty with the brother for the purchase of his stock at Kingsbridge, the proceeds of which it was intended should have been applied in discharge of Mr. *William Worth*’s acceptances now falling due. Mr. *Henry Worth* has not yet succeeded in effecting a sale, and I am now instructed to solicit a renewal upon Mr. *Henry Worth*’s acceptance at three months, by which time it is hoped that the Kingsbridge concern will be converted into cash.”

Upon the faith of this representation the petitioners consented to renew the bill, but as a collateral security, in case the intended partnership between *William* and *Henry Worth* did not take place, the petitioners required a written guarantee from *Henry Worth* to pay the aforesaid renewed bill, as well as the other current bills. A new bill was accordingly drawn, dated 1st of January 1838, by *William Worth* upon and accepted by *James Reeby*, payable three months after date, for 250*l.* 0*s.* 7*d.*, the amount of the former with interest and expenses, and duly indorsed to the petitioners; and a written guarantee was given as follows:—

“ To Messrs. *Hitchcock* and *Rogers*.

“ Gentlemen,

“ In consideration of your renewing a bill drawn by *William Worth* on *James Reeby* for 246*l.* 15*s.* 10*d.*, now dishonoured, I hereby agree to guarantee the due payment of the following bills; viz. *William Worth* on *James Reeby*, 250*l.* 16*s.* 8*d.*, due the 4th of May; *William Worth* on *James Reeby*, 254*l.* 17*s.* 6*d.*, due the 4th of

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In the matter
of
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and another.

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 ———
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 and another.

September; and the amount of the above when re-drawn, with interest, by Mr. *William Worth* on Mr. *James Reeby*, at three months, from the 1st of January 1838, viz. 250*l.* 0*s.* 7*d.*

“ I am, &c.

Henry Worth.”

On the 25th of February 1838 *Henry* and *William Worth* entered into partnership at Totness, and all the stock of *Henry Worth* was transferred into or the proceeds formed part of the stock of the firm. Before the commencement of such partnership an understanding was come to between them, as the petition stated, though it was not in evidence, that the separate debts and liabilities should be transferred to and paid out of the funds of the firm. On the 4th of April 1838 the bill for 250*l.* 0*s.* 7*d.* became due, and was dishonoured, and due notice given to all parties thereto; and the petitioners' solicitor wrote to *William Worth* as follows:—

“ Sir,

5th April 1838.

“ The bill drawn by you on and accepted by Mr. *James Reeby*, for 250*l.* 0*s.* 7*d.*, due yesterday, and indorsed by you to Messrs. *Hitchcock* and *Rogers*, has been dishonoured, and is now in their hands noted and unpaid. I am instructed by Messrs. *Hitchcock* and *Rogers* to inform you, that unless the amount stated underneath be remitted to them by return of post you will be arrested without further notice; and I beg to say that they will not afford you any further indulgence, as they have been informed that you have been preferring other creditors to them.

“ Bill	-	-	£250	0	7
Notary	-		0	1	6
Expenses	-		0	15	0

£250 17 1”

And Mr. *Harrison* also, on the same day, wrote similar letters to *Henry Worth* and *James Reeby*. On the 6th the petitioners received a letter from *William* and *Henry Worth* as follows :—

“ Gentlemen, Totness, 5th April 1838.

“ Under the circumstances of extreme dullness in business, arising in a great measure from an auction of drapery goods, selling at an immense sacrifice, we take the liberty of soliciting a renewal of 50*l.* of the draft due the 4th, 250*l.*; and assure you it shall be duly honoured, and your kindness will render us ever grateful. We enclose a bill at two months for 50*l.*, and send a banker’s draft for 200*l.*

“ (Signed) *William* and *Henry Worth*.”

The petitioners received the 200*l.*, but objected to give time for payment of the remainder, and declined to receive the renewed bill for 50*l.*, and the petitioners’ solicitor returned the same in a letter addressed to *Henry Worth*, as follows :—

“ I return you the enclosed blank acceptance of yourself and *William Worth*, received by Messrs. *Hitchcock* and *Rogers* this morning, which they decline to take towards payment of your dishonoured bill for 250*l.*, of which I notified you yesterday; and I have to add, that my instructions are peremptory, that unless you transmit the amount as directed by my letter of yesterday, short of 200*l.* transmitted this morning, the consequence will be that all parties liable to the bill will be arrested.”

On the 7th the petitioners received a letter from *William* and *Henry Worth*, as follows :—

“ Gentlemen, 7th April 1838.

“ We have this morning received from your solicitor the blank draft for 50*l.*, returned to us, stating you will not receive it, although we have remitted to you 200*l.*,

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in consequence of having given preference to other creditors. In this we do assure you that you are misled from what is true. Business is very flat, and cash scarce, yet you have no cause to be apprehensive respecting your debt, *for you will be honestly paid every penny of it.* No persons have been preferred to you, and we do hope that you will, with your usual kindness, (if not take the draft which we sent you) yet have some forbearance for a few days, and the sum shall be sent you. It surely can do you no good to run us into expenses, which are great, by ordering the issue of a writ. We cannot imagine it to be your wish to deal so harshly, for you must have perceived that we sent you the draft of 200*l.* previous to your attorney's letter coming to hand. We can only state that we will promise the desired *sum within six days from this, and you shall not be disappointed* in its receipt. If your attorney issues a writ we are prepared for bail as the only resource; but we hope sincerely no such unpleasantness will occur, as what is previously stated shall be strictly attended to.

“(Signed) *Henry and William Worth.*”

The petitioners, upon the faith of this promise, forbore to enforce payment of the 50*l.*, and consented to give *William and Henry Worth* time for payment thereof, and informed them that they would wait for payment thereof until the 16th of April then instant. On that day the petitioners received a letter from *William and Henry Worth*, as follows:—

“We beg to inform you, that on application at the London and Westminster bank you will receive the amount as by statement in your letter. We thank you for your kindness, and remain, Gentlemen,

“Yours respectfully,

William and Henry Worth.”

and on the following day a letter, containing an order on that bank for 30*l.* only. The letter was as follows:—

" Gentlemen,

" We have forwarded as above (alluding to the order of 80*l.*), and beg to express our regret that we have not been able to send the full amount, but it shall follow in a day or two.

We remain, Gentlemen,

Yours respectfully,

William Worth."

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The petitioners, on the 18th of April, cashed the draft for 30*l.*, which left a balance due to them on the 250*l.* bill of 21*l.* 10*s.*, which was never afterwards paid. In consequence of their failing to pay the balance, Mr. *William Harrison*, by the directions of the petitioners, on the 27th of April 1838, wrote to *William and Henry Worth* as follows:—

" Messrs. *Hitchcock* and *Rogers* are surprised at your having failed in transmitting them the balance due on your last dishonoured bill, amounting to 21*l.* 10*s.* I have therefore their instructions to arrest you, unless the amount be paid to them on Wednesday morning before twelve o'clock. I am requested to inform you that they have determined that no further written applications be made to you or the persons who have become responsible for your engagements with them, and in the event of any omission to discharge this amount or the current bills duly, legal measures will be adopted to enforce payment without any previous communication."

On the 4th May 1838 the bill for 250*l.* 16*s.* 8*d.* became due and was dishonoured.

On the 4th May 1838 the petitioners received a letter from *William and Henry Worth*, dated the 3d May 1838, as follows:—

" Gentlemen,

" I regret that we are under the necessity of *soliciting a few days indulgence* for payment of the instalment bill

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due the 4th. You need not be alarmed as to its safety, for finding it very harassing to ourselves and injurious to our credit, *we are now arranging means to pay in full all liabilities resting on the business, and you as well as others will be in receipt of what is due to you without delay.*

“ I remain, Gentlemen,

Yours respectfully,

William Worth.”

Which letter, as the petition alleged, was written with the knowledge and approbation of *Henry Worth*.

The petitioners caused application to be made to *Reeby* for payment of the bill for 250*l.* 16*s.* 8*d.*, and the balance; and in consequence of the nonpayment brought an action thereon against *Reeby*, who upon being arrested went to prison, and was afterwards discharged under the Insolvent Act.

On the 12th May 1838 the petitioners received a letter from *William* and *Henry Worth* as follows:—

“ Dear Sirs,

“ In order to pay off all our debts due from our trade, and to prevent any recurrence of pecuniary unpleasantness, we are determined to dispose of the business at once, and will feel particularly thankful if you can inform us of any person wishing to embrace a good business, the character of which you are well acquainted with, and which we deplore the necessity of leaving.

“ Yours respectfully,

William and Henry Worth.”

The petition alleged that the petitioners firmly believed from the statements contained in the aforesaid letters of the said *William* and *Henry Worth*, that the balance of their original debt had been carried into and adopted as a debt of the partnership of *William* and *Henry Worth*, and that the same would be realized and

paid out of their partnership funds, and that the petitioners relying thereon *forbore to take* legal proceedings against *William* and *Henry Worth* as they otherwise would have done. On the 6th June 1838 a fiat was issued against *William* and *Henry Worth*.

At the time of issuing the fiat there remained due to the petitioners a balance of 544*l.* 5*s.* 1*d.*

Proof of this amount was tendered against the joint estate, but rejected by the commissioners.

And from this decision of the commissioners the petitioners now appealed.

Mr. Swanston and *Mr. Keene* for the petitioners, contended, that by the correspondence throughout there was a clear adoption by the firm of the separate debt as a joint debt, for which the funds of the firm became liable. The petitioners, on the other hand, had assented to its becoming, so by their abstaining from legal proceedings in consequence.

Mr. Anderdon and *Mr. Bacon* for the assignees were stopped by the Court.

Sir J. Cross:— In this case the original debt of 810*l.* 6*s.* 10*d.* was owing by *William Worth* to the petitioners, and *Henry Worth* had then no concern with it. *William Worth* had given various bills, and the first being dishonoured *Henry Worth* gave his guarantee to secure the whole amount of the original debt. A partnership between the two bankrupts was then in contemplation, and, as the petition states, the guarantee was given, in case the partnership should not take place. The subsequent correspondence, no doubt, tends to show that the two *Worths* were willing to convert the separate debt, for which they had both become separately

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liable, into a joint debt, for which the partnership assets should be liable. But in order to effect such conversion there must be the assent of a third party, viz., the creditor, to that proposition. I can find nothing of that kind in the petition; on the contrary, it rather looks like an after-thought on the part of the petitioners to claim against the joint estate, whose interest it was, up to the time of the bankruptcy, to keep it as a separate debt against each, rather than a joint debt against the firm.

Sir G. Rose:—Very little is required to affect partnership property with the separate liability of one of the firm; but that *little* is wanting in this case.

Petition dismissed with costs.

C. of R.
Jan. 10,
1839.

Petition that bankrupt might be at liberty to attend adjudication by counsel refused; but petition retained, with stay of advertisement, if bankruptcy adjudged, and petitioner to apply instant for supersedeas.

Ex parte FOULKES.—In the matter of FOULKES.

THIS was a petition by the person against whom the fiat had issued, stating that he had not committed an act of bankruptcy, that there was not any petitioning creditor's debt, and that he was not a trader; that he was able to pay all his creditors in full, and that the fiat was issued, not for the purpose of prosecuting it, but to coerce the petitioner into a compliance with some terms with the petitioning creditor, who was his attorney.

The petition stated, that "if your petitioner shall be adjudged a bankrupt, great loss and injury will be occasioned to your petitioner in his fortune and reputation; and that if your petitioner shall be permitted to offer the proof attempted to be made, the petitioner believes that the commissioners will not adjudge him to be a bankrupt."

The petition prayed that the fiat might not be opened without notice to the petitioner, and that he may be at liberty to attend the opening by his counsel, and oppose the evidence which might be adduced against him.

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In the matter
of
FOULKES.

Per Curiam.:—No order for the attendance of counsel; but if the bankruptcy is found, let the advertisement be stayed, and the petitioner be at liberty to apply instantler to supersede and to stay all further proceedings, with liberty to the petitioner to amend his petition for that purpose, and let the petition stand at the head of the paper of Saturday.

On that day the petition was struck out, as there was not any appearance on either side.

In the matter of WOOD.

C. of R.
Jan. 18,
1839.

IN this case two fiats having been issued, a dispute arose as to the validity of one of them. The first fiat issued on the 14th December; on the 10th of January the adjudication was made; on the 11th of January the twenty-eight days expired, and the advertisement was sent, but not gazetted.

As to the costs on motions regarding competitions between two fiats:—Where nothing done under first, and second issues, the former falls and the latter stands; where something done under first, but out of time, and second issues in ignorance of intention to proceed with first, the latter is maintained, with costs, to the second petitioning creditor; where the

Mr. Bacon for the first fiat.

Mr. Swanston for the second fiat.

Sir George Rose:—Although in strictness you were justified and quite right in regard to the second fiat, the time for opening the first fiat having expired, still if there was a *bond fide* intention of proceeding with the latter, it must stand, and it comes to a mere question of proceeding under the first is known to the second petitioning creditor, no costs to the latter; and where known, and intention to proceed with first has been delayed or frustrated by second petitioner, the latter must pay costs of a refused motion to supersede first.

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 In the matter
 of
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costs; upon that question there are four gradations. First, where the twenty-eight days have expired, and nothing done, and another party issues a second fiat; secondly, where, although the time has expired, something is done towards opening it, but it is unknown to the second applicant; thirdly, where that something is known; and fourthly, where it is known, and the prosecution of the first has been prevented or delayed by the act of the second petitioner. In the last case, which is the present, there never was a doubt in the mind of the Court as to allowing to the first petitioner the costs of a petition to supersede the first fiat.

The first fiat must stand; the petitioning creditor under the first fiat must have his costs out of the estate. No costs to the petitioning creditor under the second fiat.

C. of R.
 Jan. 22,
 1839.

Ex parte BRETT. — In the matter of MOSES.

In general a fiat
 ought to be
 issued to the
 place where
 the bankrupt
 resides.

MR. J. RUSSELL applied to change the venue of a fiat from Bristol to London.

Sir J. Cross:— There not only are not sufficient grounds shown for this application, but it appears to me that it will be most beneficial to have the fiat worked in the bankrupt's neighbourhood. The London debts are all got in. The bankers debt is considerable, and their books require to be examined, and it is most convenient that this should take place in the country, and it would be very inconvenient to the estate to have the expense of bringing them and their books to London. Every fiat, without special reason for the contrary, should be worked near the place where the

bankrupt carried on his business, to discover where his property is, and if removed thence, his neighbours, who are generally the best witnesses, are not brought to contradict him.

Motion refused.

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Ex parte
BARR.
In the matter
of
MOSES.

Ex parte CHARLES MEEKING.— In the matter of
ROBERT BRAY.

C. of R.
Jan. 25,
1839.

THIS petition stated that the petitioner struck a docket against the above-named *Robert Bray*; the act of bankruptcy upon which the docket was struck being by a fraudulent conveyance. The petitioner believed that such conveyance was concerted, and a suspicious transaction, and done with the intent thereby to defeat or defraud partially or entirely his creditors, more especially those who lived at a distance from his place of business, which was at Cheltenham in Gloucestershire. The petition further stated the circumstances evidencing the fraud; that but incomplete means would be afforded to the general body of creditors to obtain a full and complete investigation of his affairs; and that fraud towards such creditors who resided at a distance from the bankrupt's place of business would be attempted to be practised if the working or prosecution of the fiat were to be in the neighbourhood of the bankrupt's residence, and not in London, where petitioner believed greater facilities for the attainment of justice in this case would be afforded than elsewhere, and therefore prayed that the said fiat might be directed to the Court of Bankruptcy, and be prosecuted in London, and not be directed to country commissioners, and be prosecuted there.

A London fiat will not be issued against a country trader on the allegation that the act of bankruptcy is a fraudulent conveyance, and it is alleged that a greater facility to commit fraud to the London creditors exists in the country than in London.

1839. Mr. *Keene* in support of the petition.

Ex parte
MEEKING.
In the matter
of
BRAY.

Sir *John Cross* : — I see no pretence for departing out of the regular course in this case. The fiat must be prosecuted in Gloucestershire. The only reason given for prosecuting it in London would apply to every case just as well. There will be equal, if not greater, facility given in detecting fraud in the country where the bankrupt resides.

Refused.

C. of R.
Jan 25,
1839.

In the matter of HAINES.

When the fiat
can be more
conveniently
worked at a par-
ticular place in
the country,
it will be issued
to that place.

MR. *SWANSTON* applied to have this fiat worked at Birmingham. The bankrupt carried on business at Kilsby in Northamptonshire, and at Clay Cross in Derbyshire. Kilsby is distant about thirty-two miles, and Clay Cross about forty-five miles, from Birmingham. The nearest place to Kilsby where there are commissioners is Daventry, which is twenty miles off; and the nearest list to Clay Cross is Sheffield, about twenty miles. Birmingham is halfway between Clay Cross and Kilsby. The majority in value of creditors resided at Birmingham, and the majority in value and number resided nearer Birmingham than either Kilsby or Clay Cross.

Sir *John Cross* : — The Court is extremely reluctant to depart from the general rule. But the peculiar circumstances of this case justify the application; it being shown that Birmingham is central between the two places where the business was carried on, and nearer the major part of the creditors. It is therefore a case out of the objection.

Application granted.

In the matter of STEEL and another.

C. of R.
Feb. 7,
1839.

THIS was a petition presented by one of two bankrupts, the other being dead, praying for the supersedeas of a recent commission.

To supersede a joint commission when one of the bankrupts is dead, the administratrix should be a petitioner.

The administratrix of the deceased partner, who was a creditor, consented in writing to the supersedeas, but did not join as a petitioner.

Mr. *Keene* for the petition.

Per Curiam : — The administratrix should join as a petitioner. Let the petition be amended accordingly; and, on approval of it by the registrar, let the supersedeas issue.

In the matter of DULCKEN.

C. of R.
Feb. 7,
1839.

MR. KEENE applied that the petitioning creditor may file a fresh bond, to correct an error in the former bond.

Petitioning creditor's bond amended.

Ordered. (a)

In the matter of TURNER.

C. of R.
Feb. 7,
1839.

MR. BAILEY applied to amend a state of facts before the registrar. There was a difficulty in framing the report.

State of facts before the registrar cannot be amended. Registrar's report must be made.

Sir *John Cross* : — The Court cannot interfere. It must come on upon the registrar's report, and then you state the objection.

Refused, with costs.

(a) On the same day Mr. *Spence*, in the matter of *Rich*, made a similar application, which was granted.

C. of R.
Feb. 7,
1839.

In the matter of HILSDON.

AN application for enlarging the time for opening a town fiat, as the witness to prove the act of bankruptcy did not attend, refused.

C. of R.
Feb. 11,
1839.

In the matter of HUGO.

Town fiat not issuable, although the majority of creditors and witnesses to prove requisites reside in London.

MR. *BETHEL* applied for a town fiat against a bankrupt who resided in Cornwall; the majority of creditors, in number and value, residing in London, where the witnesses to prove the trading and act of bankruptcy also resided.

No order.

C. of R.
Feb. 11,
1839.

In the matter of HELLYER.

MR. *STEERE* applied for a London fiat against a bankrupt at Spalding. Eighteen creditors resided in London, three at Spalding, and others in different parts of the country.

No order.

C. of R.
Feb. 21,
1839.

Ex parte HAMMOND.—In the matter of WEST.

Assignee elected by mistake by his own power may remove himself on paying costs.

APPLICATION by petitioner to be removed from being assignee, he having executed a power of attorney in the common form to vote in choice of assignees, and having been elected sole assignee contrary to his intention.

Mr. *Bacon* for petitioner.

Ordered, petitioner paying the costs.

Ex parte THRING.

BANKRUPT's wife admitted to prove on behalf of herself and children, with the usual order as to dividends.

Mr. *Bacon* for the petition.

C. of R.
Feb. 27,
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Bankrupt's wife
admitted to
prove.

Ex parte THOMAS GOLDNEY. — In the matter of
THOMAS GOLDNEY.

C. of R.
Jan. 30,
1839.

THIS was the petition of the bankrupt, presented in pursuance of an arrangement between him and his assignee, to obtain the opinion of the Court, whether the estate of the bankrupt in certain freehold property comprised in an indenture of settlement, dated the 7th day of May 1773, passed to the assignee.

By indentures of lease and release and settlement, dated the 6th and 7th May 1773, a freehold mansion house and other hereditaments were limited to the use of trustees and their heirs.

The petition stated that a commission, dated the 29th of April 1819, issued against the petitioner, and on the 18th of June *John Musters* was chosen sole assignee, and all the freehold estate of the petitioner was, according to the usual form of bargain and sales under commissions of bankrupt, granted, bargained, and sold, by the major part of the said commissioners under the said commission, to said *John Masters* as such assignee: That on the 12th day of August 1819 the petitioner obtained his certificate: That by certain indentures of lease and release, bearing date the 6th and 7th of May 1773, and made between *Gabriel Goldney*, therein described as of Clifton in the county of Gloucester, of the one part, and *William Cowles, Edward Harford* the younger, *James Harford, Stephen Penny*,

Effect of bankruptcy on clause of forfeiture of an estate. If at the time of the bankruptcy the bankrupt has a life interest in certain premises, expectant upon the death of the tenant for life, and there is a proviso that the person who is entitled to the use and occupancy of the premises shall reside and dwell therein, and assume the name of the donor, and, upon his neglect or refusal to comply with these conditions, shall be considered as dead, and the grant as to him be void, and be for the person next entitled thereto; and if after the bankrupt obtain his certificate the tenant for life die, the estate passes to the assignees.

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Mark Harford the younger, *Esmead Edridge*, and *Robert Simson*, all therein respectively described as being trustees for the purposes therein, of the other part, the said *Gabriel Goldney* did, for the purpose of settling and assuring the hereditaments therein-after mentioned upon the uses therein-after declared, grant and release unto the said *William Cowles*, *Edward Harford* the younger, *James Harford*, *Stephen Penny*, *Mark Harford* the younger, *Esmead Edridge*, and *Robert Simpson*, divers messuages, lands, and hereditaments in the indenture particularly described, comprising with others the following; viz., all that capital messuage or tenement situate and being in the parish of Clifton in the county of Gloucester, then in the possession of him the said *Gabriel Goldney*, together with the coach-houses and stables, orchard or garden, to the said messuage or tenement adjoining or belonging, as the same were laid out; and also all those erections and buildings in the said garden and orchard, or one of them, erected, standing, and being, commonly known and distinguished by the name of the engine house or fire engine, the grotto, the greenhouse, the octagon room, the rotunda, and all other edifices, erections, and buildings in the said garden and orchard, or either of them, erected, standing and being; and also all that large messuage or tenement theretofore erected by *Robert Smith* on ground formerly part of Clifton Wood; and also all that large garden, containing by estimation two and a half acres, adjoining to and lying on the west side of the same messuage; and also all that paddock of ground, containing by estimation two and a half acres or thereabouts, called the orchard, adjoining to and lying on the west side of the said large messuage, which said messuage or tenement, gardens and orchards, with the new-erected coach-houses and stables, were then in the tenure of *Richard Farr* as tenant

to him the said *Gabriel Goldney*, party thereto, together with certain other hereditaments situate at Clifton aforesaid; and also all that capital messuage or farmhouse commonly called or known by the name of Elberton's Farm, otherwise Elverton's Farm, with the appurtenances, wherein *Andrew Williams* theretofore dwelt, situate in Elberton alias Elverton, in the said county of Gloucester, together with numerous closes of land therein mentioned, containing in the whole two hundred and thirty-four acres or thereabouts, and which farmhouse, lands, and hereditaments were then in the tenure or occupation of *Hester Roberts* as tenant to him the said *Gabriel Goldney*, to certain uses and upon certain trusts therein declared, and which have since expired or never taken effect; and, subject thereto, upon trust to permit and suffer the said capital messuage or mansion house, with the garden thereto belonging, and the edifices and buildings in such garden, to be occupied and used by *Gabriel Goldney*, the eldest son of *Gabriel Goldney* therein described, for and during the life of such eldest son; and from and after the death of such eldest son, to permit and suffer the same to be occupied by the said *Thomas Goldney* (the bankrupt), the second son of the said *Gabriel Goldney* of Chippenham, for and during his natural life; and from and after the determination of the several estates and interests therein-before limited, then upon trust to permit and suffer the said capital messuage or mansion house, with the garden thereto belonging, to be used and occupied by *Samuel Goldney* of Bath, linen draper, brother of him the said *Gabriel Goldney* of Chippenham; during the term of his natural life, and after his decease to permit and suffer the same to be occupied and used by *Francis Bennett Goldney* the eldest son, and so in like manner in succession by the second and third son of

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1839. the said *Samuel Goldney* therein named, and also in succession of them by other persons therein named for life; and after the determination of such several life estates or interests, then upon trust to convey and assure the said capital messuage and other the freehold premises therein-before described to all and every other the sons and daughters of the said *Gabriel Goldney* of Chippenham, and to all and every the sons and daughters of the several other persons in the said indenture named in favour of whom the said limitations were made, and to the heirs male and female of his, her, or their body or bodies respectively in the course of entail, the sons and daughters of the said *Gabriel Goldney* of Chippenham, and the heirs of his, her, and their body and bodies respectively to take and be preferred before all the other persons last above named; and upon trust also, that they the said trustees, and the survivors and survivor of them, and the trustees and trustee for the time being, should receive the rents, issues, and profits of all and singular the messuages, lands, tenements, rents, and hereditaments therein-before mentioned, and thereby granted and released, other than and except the said capital messuage or mansion house, garden, and other the premises therein-before limited to such uses as aforesaid; and in the first place pay the several fee-farm and other rents issuing and payable out of and for the said premises, or any part thereof, and the costs and charges of the execution of the trust thereby created; and after payment and satisfaction thereof should keep in good substantial repair the said capital messuage or mansion house, with the garden thereto belonging, and the grotto and other buildings therein being, and the furniture and ornaments of such messuage or tenement, garden, grotto, and buildings, (except the paintings,) in the garden, and replenish the said garden
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of
GOLDNEY.

and the greenhouse with the trees, shrubs, and plants in the stead and place of such as might from time to time decay or perish, and in general keep the same messuage, garden, grotto, and other buildings, and every part thereof, except as aforesaid, in good condition and well stocked; and, in the next place, pay the fine for renewing and keeping full standing the lease of a close of ground therein-after mentioned, and which was thereby assigned to the said trustees upon the like trusts, and should pay over the rest and residue of such rents, issues, and profits to the person, and for his or her own use, who should from time to time, by virtue of the limitations therein contained, be entitled to the use and occupancy of the said capital messuage or mansion house, and the garden and other premises thereto belonging, for and during such time as he or she should be entitled to such use or occupancy; and upon further trust, that when and so soon as any person or persons should, by virtue of the limitations and directions therein-before contained, be entitled to a settlement of the said capital messuage or mansion house, garden, and premises for an estate in tail general or other estate of inheritance, they the said trustees, and the survivors and survivor of them, and the trustees and trustee for the time being, should at the same time also convey, settle, and assure all and singular other the freehold messuages, lands, tenements, and hereditaments thereby granted and released, unto such person or persons, and for such estate and estates in tail general or other estate of inheritance, and with such remainder over as were therein-before directed to be limited in and by such conveyance, settlement, and assurance as aforesaid, and of and concerning the said capital messuage or mansion, garden, and premises. And by the said indenture certain leasehold premises and certain chattels

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as heir looms were assigned to the said trustees, upon trusts to apply and pay the rent of the said leaseholds in like manner as was directed regarding the rents and proceeds of the said freehold hereditaments, and upon trust to permit and suffer the said heir looms to remain as heir looms annexed to the said capital messuage, and be enjoyed therewith. And it was by the said indenture provided and expressly declared and agreed that the person who should from time to time by virtue of the said indenture be entitled to the use and occupancy of the said capital messuage or mansion house, garden, and premises for life should reside and dwell therein; and that all and every of such persons whose surnames should not be *Goldney* when he or she should become entitled to such use and occupancy, and the husbands of any of them, being females, should, during such use and occupancy, use the additional name of *Goldney*, and make use of the *Goldney* arms on all occasions, as well public as private, and that such person and persons who should neglect or refuse to observe and obey this direction should be considered as though naturally dead, and the freehold or occupancy should, as to him or her so neglecting or refusing, cease and be void, and be for the person who would be next entitled thereto.

On the 29th of April 1819 a commission of bankrupt issued against *Thomas Goldney*, and on the 18th of June following *John Masters* was chosen sole assignee, to whom the usual bargain and sale of the bankrupt's freehold property was made.

On the 12th of August 1819 the bankrupt obtained his certificate.

At the date of the commission *Gabriel Goldney*, the first tenant for life named in the indenture of settlement, was in possession and occupation of the mansion house and premises, and the bankrupt was next entitled

to such possession and occupation for his life in remainder, expectant upon the death of the said *Gabriel Goldney*. *Gabriel Goldney* died on the 9th of February 1887, and immediately thereupon the bankrupt, having complied with the provision contained in the indenture, and taken the name and arms of *Goldney*, entered into possession and occupation of the said mansion house and premises at Clifton. The petitioner, after stating the above facts, further stated, that the bankrupt had ever since continued and was then in the occupation and possession of the mansion house and premises; and that new trustees had been appointed to carry into effect the trusts of the said indenture of settlement; and that the heir at law of the last surviving trustee and the said *Gabriel Goldney* had received the rents and profits of the rest of the hereditaments and premises comprised in the said indenture of settlement, amounting in the whole to the sum of 1,250*l.* and upwards, and had thereout paid certain ground rents, tithes, charges, and expenses, amounting to 400*l.* and upwards, and 400*l.* to the bankrupt, leaving the sum of 400*l.* and upwards in their hands. That the said *John Masters*, as the assignee of the bankrupt, had given notice to the said trustees not to pay the rents and profits of the said hereditaments, &c. comprised in the said indenture of settlement, which were in their hands, or any rents and profits thereof which they might thereafter receive to the bankrupt; and that the said *John Masters* claimed to be entitled thereto as such assignee as aforesaid during the life of the bankrupt; whereas the bankrupt claimed to be entitled thereto for his own use and benefit; and he submitted to the Court that the same did not pass to the said *John Masters* as such assignee as aforesaid, under or by virtue of the said bargain and sale or otherwise. That in this state of things the bank-

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rupt and the said *John Masters* entered into the following agreement; that is to say, "terms of agreement," between Mr. *Thomas Goldney* of Chippenham and Mr. *John Masters* of Bristol, his assignee, in respect of the mansion house, lands, and hereditaments comprized in the indentures of settlement of the 7th of May 1773, as previously arranged: 1st, that the assignee receive, for the benefit of the estate, the rents of the property at Elberton, paying thereout all charges and disbursements incident thereto; this net produce is estimated at 300*l.* per annum. 2d, That Mr. *Thomas Goldney* receive the rent of all other the property for his own use, to enable him to support his occupation of the mansion house, paying thereout all charges and disbursements for which the property at Elberton shall be specifically liable; this net produce is estimated at 350*l.* per annum, exclusive of the use of the mansion house and gardens. 3d, That the assignee pay to Mr. *Thomas Goldney*, in aid of his expenditure on entering the mansion house for his occupation, the receipt of the rent of the Elberton property accruing to the 25th of March 1838; retaining thereout his costs as assignee, until the future rents received shall have enabled him to liquidate the same. 4th, That the foregoing arrangement be provisional, until submitted to a gazette meeting of creditors, and subsequently brought under the consideration of the Court of Review in bankruptcy for confirmation or approval; and that Mr. *Thomas Goldney* be at liberty to take the opinion of the Court on the right of the assignee to any portion of the property under the settlement; and if the Court shall adjudge the assignee to have no right or interest in the property, then the costs of both sides are to be paid out of the rents; and if the Court shall adjudge in favour of the assignee, and in confirmation of the arrangement, then the as-

signee will defray his costs and expenses out of the monies to be received by him as before proposed from the rents for the benefit of the estate, and Mr. *Thomas Goldney* will defray his costs out of the rents apportioned to his use. 5th, As respects the expenses, that all costs, charges, and expenses necessarily incurred in maintaining and keeping possession, and on the appointment of new trustees to the settlement, or in arranging with the heir at law of the surviving trustee in the proposed receipt of rents, and all repairs and other expenditure necessarily performed in exercise of the trusts of the deed of settlement of the 7th of May 1773, and all costs, charges, and expenses of the heir at law of the surviving trustee and the new trustees when appointed, or their solicitors or agents in exercise of the trusts of the same indenture, so far as Mr. *Thomas Goldney* or his estate may be liable to the same, to be borne and paid equally by the two respective parties by and out of the rents of the whole trust estate, and charged upon the same rents accruing subsequent to the 25th day of March next, in the proportion of one moiety to the assignee and the other moiety to Mr. *Thomas Goldney*. 6th, Mr. *Thomas Goldney* to enter into covenant, when thereto required, to continue to reside and dwell in the mansion house and premises for the term of his natural life, in compliance with the condition annexed to the enjoyment of the same, with the rents and profits of the other premises; but nothing herein contained is to extend to prevent the full right of Mr. *Thomas Goldney* to obtain the opinion of the Court on the right of the assignee as before mentioned; nor is this memorandum in any manner to be used to prejudice the full and uninterrupted enjoyment by the said *Thomas Goldney*, free from claim, right, or title by the said assignee, should the decision of the Court be against such claim, right, or title independently of this

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arrangement, and in as full a manner as if the same had never been concluded or agreed. 7th, That inasmuch as the proportion of property allotted to the said *Thomas Goldney* comprises a mansion house and premises occupied by Mrs. *Ames*, at the annual rent of 300*l.*, and her tenancy may soon determine, and that a considerable loss in income may be thereby sustained, the said *John Masters* shall allow to the said *Thomas Goldney*, from the rents of the said *Elberton* lands, one moiety of any loss to be sustained by reason of the premises so rented by the said Mrs. *Ames* becoming void, and being re-let at an inferior rent on the determination of that lady's tenancy. The petition further stated, that notice was given in the *London Gazette* of the 14th of July 1837, of a meeting of the creditors of the bankrupt, to be holden on the 8th day of August then next ensuing, at a time and place therein named, in order to consider the terms of the said arrangement, and to assent to or dissent from the same being carried into effect, but that no creditor attended the meeting; and it therefore prayed that it might be declared by the Court, that the estate or interest of the bankrupt of and in the hereditaments and premises comprised in the said indenture of settlement did not pass to the said *John Masters*; and that he the said *John Masters* might be ordered to withdraw the notice so given by him to the said trustees not to pay the rents and profits of the said hereditaments and premises to the bankrupt; and that he might be ordered not to do any act or acts to prevent or hinder the bankrupt from receiving the rents and profits of the premises. In the deed the words creating the trust for the petitioner were, "to permit and suffer" the premises "*to be occupied and enjoyed*" by the said *Thomas Goldney*.

There was also a cross-petition on behalf of the assignees.

Mr. *Swanston* and Mr. *Bethell* for the bankrupt:—

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The bankrupt obtained his certificate many years before he became entitled to the possession of this property, and nothing therefore could pass to his assignees. At the time of his bankruptcy he had a bare right, subject to the contingency of his life. It is now no more than a right which must by the deed of settlement be personally exercised; a personal privilege to the use of the mansion, &c., on condition of his residing there, and doing certain other acts, and which it is impossible his assignees can exercise according to the intention of the settlor. It is an inseparable incident to the person of the bankrupt, and the moment it separates, his right is at an end. The right to the benefits given in the deed depends solely on the continuance of the bankrupt to reside in the mansion, and to use the name, &c.; acts which it is not in the power of this or any Court to compel the performance of. It is not unlike the instance of property in Scotland belonging to the bankrupt. There the only mode by which the Court could compel the bankrupt to convey it was, by the power the commissioners held over him, by refusing to sign his certificate in case of noncompliance; even that power does not exist here, because the certificate has long since been obtained. In fact, nothing short of an act of parliament could be of any avail. In order to entitle the assignees to any order on these petitions, they must make out that the Court has power to compel the bankrupt to reside, and perform the conditions on which his estate depends; to give them that which solely depends on the will of the bankrupt would be an absurdity. This case is distinguishable from *Brandon v. Robinson* (a), because here is a clear limitation over, in the event of the conditions on which the bankrupt's

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(a) 18 *Ves.* 429.

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life interest depends not being strictly performed. The bankrupt cannot be compelled to give up possession, because he is personally to occupy the mansion, and that alone entitles him to receive the rents of the other parts of the property. By giving up the possession he can give no title to his assignees, because his life interest is gone from that moment to the next person in remainder. The assignees in no case can be entitled to occupy this property, and therefore the Court is driven to consider the question of their power to compel the bankrupt to continue his residence there; which the Court can no more do than, if the condition were to reside within a particular county, they could enjoin the bankrupt against ever quitting it. This is an inalienable interest, and therefore cannot pass to his assignees.

It was also contended, on the bankrupt's behalf, that the interest was not sufficiently existent at the period of the bankruptcy as to pass by the usual assignment by bargain and sale, and the cases of *Carleton v. Leighton* (a) and *Moth v. Frome* (b) were cited.

Mr. *Girdlestone* and Mr. *Bigg* for the assignees: — The question now is, not whether a forfeiture will arise of which the remainder man can take advantage, but whether the bankrupt can hold this property against his assignees? But upon the first point we should contend, that a different construction may be placed on this deed than that for which the other side contend. Although the obligation to occupy the mansion house, and the right to do so, be personal, yet it is otherwise as to the enjoyment of the rents of other parts; and it is to be remarked, that while the first and second tenants for life are directed to "occupy and use" the premises, &c., the bankrupt is to "use and enjoy." One

(a) 5 *Mer.* 667.

(b) *Amb.* 394.

is clearly personal, while the other is not so. "Enjoyment" being to be had otherwise than by actual possession. We concede that if the right to the house ceases, the right to enjoy the rents of the rest of the property also goes; but that is not now to be determined; the mere question being, whether so long as the bankrupt continues to reside in the mansion house the assignees are not to take the rents. The parties in remainder may take in the event of non-residence; but that circumstance cannot vest any inalienable right in the bankrupt. [Sir John Cross:—I observe the words in the clause of forfeiture are, if he shall "neglect and refuse" to reside.] The clause of forfeiture cannot avail in bankruptcy, and in this case more especially, as the bankruptcy cannot be considered such a neglect and refusal as the deed contemplates. The rule from all cases on the point of forfeiture is, that the condition must happen in the very terms. *Holyland v. De Mendez* (a) shows the strictness with which Courts look at words creating forfeiture. Upon the general question the judgment of Lord Eldon, in *Brandon v. Robinson*, is as strong as possible in our favour. So is *Graves v. Dolphin* (b), where an annuity was given for the personal support of the bankrupt. Also *Green v. Spicer*. (c) [Per Curiam:—To which you may add the class of cases relative to covenants not to assign without licence, as the operation of law is too strong to allow of forfeiture.] Also *Lear v. Leggett* (d), *Piercy v. Roberts*. (e) The Court must bear in mind that it is not called on to make any mandatory order on the bankrupt; for if it approve of the agreement, that will provide for the bankrupt's continuance in the occupation of the

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(a) 3 Mer. 184.

(d) 1 Russ. & M. 690.

(b) 1 Sim. 66.

(e) 1 Myl. & K. 4.

(c) 1 Russ. & M. 395.

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estate. [Sir *George Rose* : — If property be found in the bankrupt at the time of his bankruptcy, as a general maxim he cannot in any way keep it from his assignees.] And as to forfeiture, the whole distinction turns on whether the act to cause it is voluntary or involuntary.

Mr. *Bigg*, on the same side, was stopped by the Court.

Mr. *Swanston* in reply : — The question is, whether at the time of the bargain and sale, or of the certificate passing, there was a sufficient vested interest in the bankrupt to pass by the bargain and sale to the assignees? We contend not. The legal estate was in trustees, the bankrupt having a mere equity; an estate which must cease the moment an attempt were made to convey it from him. The other side are driven to the argument, that it passed to the assignees by the bargain and sale; and if so, there is no use of their coming here. But what passed? A mere possibility of interest dependent on the caprice of the bankrupt. (a)

Sir *John Cross* : — This is a case which cannot properly bear one moment's argument. The grantor in 1773 created the interest in question, settling the property on several of his relations in succession, coupled with the

(a) In *Doe, d. Duke of Norfolk, v. Hawke*, 2 East, 481., *A.* gave by will his tenant-right, which he held by lease, to *A. I.*, but not to dispose of or sell it; and if he refused to dwell there, or to keep it in his own possession, then over. *A. I.* having borrowed money, left the title deeds with his creditor as a security, and confessed a judgment to secure the money, and having also given a judgment to another creditor, who issued execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in execution; and *A. I.* having left the premises, and ceased to dwell there, on the day of the execution, before the sheriff entered,—held that the remainder man was entitled to enter, the estate of *A. I.* having determined by such his acts.

condition that they should occupy and keep up the mansion and other ornamental parts of the premises, and should use and take his arms and name; and he thereby created an interest in remainder in the bankrupt vested in him from the moment of executing the deed, and thenceforward the bankrupt became entitled to a life estate in remainder, subject to the condition. He had that estate at the time of his bankruptcy, and the argument has been properly put on the part of the assignees, as though he had the legal instead of a mere equitable estate; and I think that estate clearly passed to the assignees by virtue of the bargain and sale. The bankrupt had an estate, subject to certain limitations, the conditions of which were of a personal kind, to be performed by the bankrupt. He might, by refusal to perform those conditions, create a forfeiture; but until the limitation over takes effect there is a life interest in the bankrupt, which, notwithstanding the conditions, must pass to his assignees. I think that on his bankruptcy those conditions were at an end, though there is no necessity to decide that point. There is no stipulation in the deed to prevent the operation of law. The assignees admit that according to the cases the deed might have provided for forfeiture in the event of bankruptcy; but to that end it is silent. I am therefore of opinion that the assignees must take the property, and the agreement between them and the bankrupt seems the wisest measure that could be adopted.

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Seemle, that conditions as to residence, &c., otherwise to forfeit the estate, are at an end upon bankruptcy.

Sir *George Rose* :—The only difficulty in this case has been the mode of framing the order, for until we ascertained that the bankrupt would submit to the jurisdiction, and that the trustees would obey the order when made, it is quite clear we could do nothing. We could only proceed on the principle of covenant, so as to oblige the bankrupt to continue those acts necessary

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Quare, as to a
mandatory
order on bank-
rupt to perform
conditions in a
deed of settle-
ment, so as to
preserve the
interest of the
assignees.

Arrangement
between bank-
rupt and assign-
ees, entered
into out of
Court, sanc-
tioned by the
Court.

to keep the estate alive in him, giving the assignees an equitable interest, as though the question had been raised upon a bill in equity, bringing all parties before the Court. If a mandatory order had been sought to enjoin the bankrupt to perform the conditions in the deed of settlement, there might have been great difficulty in any Court making such an order. But whatever effect the bankrupt's noncompliance with the conditions might have had, the assignees finding this life interest now existent in the bankrupt have a right to take it as property. There can be no doubt as to the power of conveying the property, as between the bankrupt and the assignees; the only difficulty would arise in case the trustees should refuse to acquiesce therein. However, we are given to understand that they are willing to obey the order of the Court. By numerous decisions it has been maintained, that where the non-compliance with conditions on which the question of forfeiture depends arises by act of law, forfeiture does not take place. But it is unnecessary to decide that point. It is sufficient if we find the bankrupt's right still existing, and then as property it cannot be withheld from the assignees. The bankrupt might by a malicious or capricious determination in his own mind refuse to perform the conditions, and so give immediate effect to and let in the estate of the remainder man. But till he does so, he cannot so hold the estate himself as to keep it from his creditors. It may only be of avail to them for one minute, or for the bankrupt's life; but for so long as it exists, it is property belonging to the assignees, though subject to the bankrupt's caprice. As to the agreement between the bankrupt and the assignees, we have in general no power to consider its propriety; parties must act on their own responsibility in general cases. But this case is one of peculiar circumstances, and the agreement is one of a nature such as a Court of

equity would not only have sanctioned, but would have recommended, in order to prevent the possibility of a forfeiture: I therefore think we ought to give it our sanction. The order must therefore

DECLARE that all the property passed to the assignees, and that it is proper that the agreement proposed to be entered into be carried into effect.

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GOLDNEY.
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Ex parte JOHN WILLIAMS and others, on behalf of themselves and the other creditors of *William Wynne*, deceased.—In the matter of JAMES and SAMUEL KNIGHT.

C. of R.
Nov. 5,
1838.

Upon the bankruptcy of an executor the Court will secure the fund, but has not jurisdiction to direct payment to the several creditors of the testator.

JAMES and *Samuel Knight* carried on business as bankers at Mold, Flintshire. In 1820 *William Wynne*, being considerably indebted, died; having appointed *James Knight* his executor, to whom *James* and *Samuel Knight* were indebted in about 3,000*l*. In December 1831 *James* and *Samuel* were declared bankrupts. In July 1833, the present petitioners having applied to this Court, an order was made directing *James Knight*, as executor, to go in and prove against the joint estate and his separate estate, in respect of the sums due to the petitioners by the testator, and that the dividends on such proof should be paid into the Bank of England, with the privity of the Accountant General of the Court of Chancery (*a*), to the account of the petitioners, to be entitled "The account of the unsatisfied creditors of the testator *William Wynne*, deceased;" and that the costs of all parties should be paid out of the bankrupts estate. Accordingly *James Knight* proved, and the

(*a*) This was prior to the establishment of the office of the Accountant in Bankruptcy.

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 of
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 and another.

dividends were paid into the bank in the name of the Accountant in Bankruptcy.

The present petition therefore prayed, that the costs of all parties in this and the former petition might be taxed and paid out of the bankrupts estate, and a reference to take an account of what was due to the petitioners respectively, and to apportion the amount of dividends among them according to the amount found due to them, and that the accountant in bankruptcy might be directed to divide the amount among them, pursuant to the apportionment, or that it might be paid to *James Knight* on his giving security duly to administer.

Mr. *Stinton* for the petitioners.

Per Curiam.—The proper Court to apply to for distribution of the testator's estate is the Court of Chancery, and to effect that object a bill must be filed; we can only be auxiliary to that tribunal by getting in and securing the fund in the meantime.

Ordered, that upon bill filed in Chancery the Accountant in Bankruptcy should pay the amount over to the Accountant General in Chancery in trust for the cause. Costs of the former petition out of the bankrupts estate, and those of the present one out of the fund.

C. of R.
 Nov. 6,
 1838.

Ex parte EVANS and *ex parte* ELLIS.—In the matter of EVANS.

Mere delay is not an objection to carrying a former order into effect.

IN January 1833 an order had been made in this bankruptcy, directing certain inquiries as to arrangements proposed to be entered into between the former

assignees, who had been removed by order of the Court, and the present assignees, under which nothing appeared to have been done; and the object of the present application was to revive that order.

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of
EVANS.

Mr. *Swanston*, for the respondents, opposed the application on the ground of delay.

But the Court said, an application to carry a former order into effect is quite of course, unless a change of circumstances has taken place during the delay, which would constitute it a hardship or injury to the party objecting; as where the delay had occasioned a loss of evidence. If mere delay is the only objection, the party taking it must have been equally in default, as he might have compelled the other side to elect to prosecute, or abandon the order within a reasonable time, by applying to the Court.

Mr. *J. Russell* and Mr. *Bethell* respectively for the two petitions.

Ordered.

In the matter of CROSSLEY.

PRACTICE IN COURT.

UPON this petition being called on, the respondent not appearing, and Mr. *Swanston*, for the petition, not being prepared, for want of an affidavit of service, to take any order upon it, asked that it might stand over and keep its place in the general paper. The case next to it in the paper was *ex parte Hall* in the matter of *Hall*, which standing last in the paper of the day was privileged.

C. of R.
Nov. 13,
1838.

If a petitioner has not his affidavit of service in Court, the petition can only stand over generally.

Mr. *Anderdon*, as counsel in *ex parte Hall*, objected to the matter of *Crossley* keeping its place, and so having priority on the next day of hearing over *ex parte Hall*.

Petition ordered to stand over generally.

***Ex parte* HIGGS.**—In the matter of EVANS.

IN this case in May 1815 the original commission issued, and in November 1816 a renewed commission, two of the commissioners in this latter commission having since died, and two having gone to reside 100 miles and the fifth eighty miles from the spot, where it was directed to be opened, a renewed fiat was sued out in the present year; which, inasmuch as it was wholly silent as to the renewed commission of 1816, the commissioners in the renewed fiat declined to proceed with.

Mr. Swanston for the petition.

in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed flat.

petition, on the ground of the pendency of a petition before the Lord Chancellor to annul the fiat; but

The Court decided that to be no objection to proceeding with the present case.

1838.

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HIGGS.
In the matter
of
EVANS.

Mr. *Bethell* then objected, that the petitioning creditor under the renewed commission of 1816 had not been served, and no binding order could be made behind his back; neither under the circumstances ought the Court to make such an order even were he brought before it. Several dividends had been declared, and a bill in Chancery had been filed, and from that Court had been carried up to the House of Lords on appeal. From the affidavits in opposition it also appeared that the surviving commissioners under the renewed commission of 1816 were ready to proceed with it.

Per Curiam: — The petitioning creditor cannot be prejudiced by any order we shall make. This is a mere question of convenience to the estate; and it appears to us that the affairs of the bankrupt can be better managed under the recent fiat, on account of the distance to which the commissioners under the commission of 1816 have removed from the place where it ought to be worked. Superseding a renewed commission is very different from so dealing with an original one.

The commission of 1816 superseded, and the proceedings under it transferred to the renewed fiat, unless, on the petition to the Lord Chancellor, he shall think fit to order it otherwise.

C. of R.
Nov. 22,
1838.

Petition to
expunge proof
by a bankrupt
must show that
the surplus or
amount of his
allowance will
be affected.
Leave to
amend. (a)

Ex parte PITCHFORTH.—In the matter of PITCHFORTH.

MR. SPENCE, for the petition, stated it to be on behalf of the bankrupt, praying to expunge proof to the extent of 900*l.*, out of 1,000*l.*

Per Curiam :—The petition does not allege that by the expunging, the bankrupt's interest in the surplus or in the amount of allowance can be affected. If the expunging would not produce one of these effects, the bankrupt has no interest.

Leave given to amend the petition, to let in the statement. If not amended within a fortnight, the petition to be dismissed, and the respondent's costs out of the estate.

C. of R.
Nov. 23,
1838.

Unclaimed dividends in hands of executor of surviving assignee ordered into Court, but new assignees must be appointed before the executor will be released.

Ex parte RAIKES.—In the matter of TUKE.

IN this case the surviving assignee having died, having in his hands a certain amount of unclaimed dividends, his executrix petitioned to pay the same into Court, and that she might be released from further liability regarding it.

Mr. Jervis for the petition.

Per Curiam :—Take the order to pay the amount into Court; but without the appointment of fresh assignees, who will watch your proceedings, no release can be given.

(a) See *ex parte Pownall* 2 M. & A. 707; *ex parte Freeman*, Dea. & Ch. 404.

Ex parte FORD.—In the matter of FORD.

Nov. 26,
1838.

THIS was a petition by the bankrupt to annul the fiat on the ground of no trading, act of bankruptcy, or petitioning creditor's debt.

Where a bankrupt, petitioning to supersede for want of requisites to support fiat, has applied for copies, and seen the proceedings, the onus probandi of making out his case lies on him, and it is not sufficient to deny the requisites generally; and without his doing so, the respondent may rely on the proceedings alone.

Mr. Swanston and *Mr. Teed* for the petition.

Mr. Spence and *Mr. Dixon* for the petitioning creditor.

A fiat founded on a bill due to a solicitor before taxation is good *prima facie*; if afterwards on taxation it is reduced below 100*l.*, *semble* the fiat will be superseded.

The petition being opened, and the affidavit in support of it being read, a question arose on whom the *onus probandi* lay,—whether on the petitioner to prove the negative, or on the petitioning creditor to prove the affirmative. The former had been supplied with copies of the depositions, notice of reading which had also been served on him.

Sir G. Rose:—In that state of things this differs from the ordinary case. A good act of bankruptcy and petitioning creditor's debt appear on the proceedings, and the petitioner, having had the advantage of seeing the charge brought against him, must be required now to disprove the existence of those requisites by better and more precise evidence than that already opened to the Court.

ERSKINE C. J.—If the respondent has any affidavits in support of the depositions on the proceedings, he had perhaps better put them in at once.

Mr. Spence and *Mr. Dixon* then read affidavits in proof of an act of bankruptcy, by denial to a creditor; of trading, in the character of a builder, and buying and

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selling of timber ; and of a petitioning creditor's debt, by a debt contracted by the bankrupt with the petitioning creditor in the relation of solicitor and client.

Mr. *Swanston* and Mr. *Teed* then objected to the debt because the items were not specified in the bill. It was a bill delivered in such a form, that no verdict could be taken at law in respect of it. The bill had not only never been taxed, but never was seen by the bankrupt before. It was subject to taxation, which might reduce it below 100*l.*, and therefore could not constitute a good petitioning creditor's debt.

Per Curiam :—The amount is a subject to be ascertained by reference to the registrar, who may be directed to enquire whether it was sufficient at the date of the fiat. It is no objection to it as a petitioning creditor's debt that it has not been taxed, because, when taxed, nothing may be struck off. The omission to tax it previously does not debar the right to prove it as a sufficient debt. When taxed, if it be reduced below 100*l.*, it will be time enough for the Court to deal with the question of supersedeas ; and, under the circumstances,—

It was ordered to be referred to the registrar, to take an account of what was due to the petitioning creditor, and to tax the bill, with a view to the question of sufficiency of debt. As to the trading and act of bankruptcy, a *vivâ voce* examination was ordered, the respondent to give the petitioner notice if he intended to rely on an act of bankruptcy other than that appearing on the proceedings.

Ex parte EDWIN GEE.—In the matter of THOMAS SAWER.

C. of R.
Jan. 26,
&
May 8,
1839.

THE petition stated that in June 1838 the petitioner presented his petition in this Court, in the matter of the above bankruptcy, stating, amongst other things, that the petitioner was formerly in the service of the said bankrupt, and that the bankrupt, at the time of his bankruptcy, was indebted to the petitioner in the sum of 277*l.* 4*s.* 1*d.*, being the balance of his salary or wages; and that, as such servant, the petitioner was entitled to the sum of 125*l.*, being six months salary, and to have the same paid to him out of the bankrupt's estate, and to prove for the balance remaining due after receiving such allowance in respect of his salary, and praying that the payment of the dividend so declared as in the said petition mentioned might be stayed, and that an advertisement might be inserted in the London Gazette, for the purpose of calling a meeting for the proof of the debt of the petitioner, at the end of twenty-one days from such advertisement; and that the commissioner at such meeting might be at liberty to order that upon such proof of the said debt so due to the petitioner, as such clerk or servant, the petitioner might be paid a sum of money, not exceeding six months salary, out of the estate of the said bankrupt, and be at liberty to prove under the said fiat for the sum of 122*l.* 4*s.* 1*d.*, being the residue of the said sum of 247*l.* 4*s.* 1*d.* so due to the petitioner; he, the petitioner, undertaking to pay the costs and expenses of such meeting.

By an order made upon the said petition, and dated the 12th day of June 1838, it was referred to Mr. Gregg to inquire and state at what time and in what manner the petitioner quitted the service of the said bankrupt,

A clerk, who had involuntarily quitted the bankrupt's service nine months previous to the fiat, through the approaching insolvency of the bankrupt and his decreasing business, the trade going on in the meantime, and he obtaining employment elsewhere :—
Held, not entitled to six months wages in full, especially where he had allowed the first and final dividend to be declared before making his claim.
Dubit.
Sir G. Rose.

1839. *Thomas Sawyer.* In pursuance of the said order, the registrar made his report, dated the 5th November 1838, and certified that the petitioner lived in the service of the said bankrupt for about fifteen years; that at the time he left, his salary was 250*l.* per annum, and that it was a rising salary, beginning at 30*l.* per annum; and that the petitioner received notice to leave the bankrupt's employ about the middle of February 1837, and that the petitioner then quitted his employment; and that he left the said bankrupt's service in consequence of the expense of the salary, and was told by the bankrupt that his son would do the journies of the petitioner, who expressed a wish to remain in the service of the said bankrupt six months longer, thinking he might be able, knowing the bankrupt's connexion, to do better for him than his son; and that the petitioner left the service of the bankrupt in February 1837; and that the bankrupt credited the petitioner for his salary up to the next quarter day; that there was one year and a quarter's salary owing to the petitioner, with the exception of some little monies, about 5*l.*, due at that time; and that he had shortly before received about 5*l.*, and that was all the money the petitioner received at that time; that the petitioner received other monies, and a gig, on account, as appears by the affidavit of the petitioner, filed on the 3d day of July 1838, in the matter of the petition; and the petitioner received no money, nor anything else besides, except as stated in that affidavit; that he had no money by him; that the petitioner left because the said bankrupt gave him notice, and stated that he could not afford his salary, and that was the only reason of his leaving; that upon the cross-examination of the petitioner by Mr. *William Bell*, the petitioner stated that he believed that the gig credited in his account was taken in the month
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of August 1837; that the petitioner really could not tell the exact time that he received it, in consequence of his application for money; that when the petitioner applied for money the bankrupt said, "There is a gig standing at York; you may take that, if you can make anything of it;" that the petitioner took the said gig, under an agreement with the bankrupt, for 20*l*.; that the petitioner had to pay 12*l*. 10*s*. in addition, which was due upon it; that there was never any agreement with the bankrupt that the petitioner should have interest for the balance; that interest was never mentioned; that the petitioner entered the service of Messrs. *Nalder and Co.* in February 1837 or March 1837; that the petitioner had not been negotiating with them previously; that the petitioner had received offers from three other houses, which he declined in consequence of being with the bankrupt; that Mr. *Bell* handed the petitioner a paper, signed by the said bankrupt. The paper produced at such examination, and marked B., is that paper, of which the following is a copy:—

"(B.) *F. Gregg*. { Exhibited before me on the examination of *E. Gee*, the 15th day of March 1838.

"Mr. *Thomas Sawyer* states that he made a deed of composition with his creditors in January 1837; does not know whether Mr. *Gee* executed the deed or not; Mr. *Sawyer* carried on the business from that time, the stock being valued to him, for which he gave security; the business did not cease in consequence of this deed; it went on as usual; Mr. *Gee* was not on a journey at the time that deed was made; he was in London; Mr. *Gee* was one who assisted and valued the stock, along with Mr. *Davis* the accountant; Mr. *Sawyer*, in consequence of having been under the necessity of making

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that deed, was obliged to reduce the expenses of his establishment, and it was arranged between him and Mr. *Gee*, that the latter should quit his service.

“As that had the effect of putting Mr. *Gee* out of employment without previous notice, Mr. *Sawer* considered it proper that he should have some compensation allowed him, and that his salary should be reckoned up to the end of the current quarter. Mr. *Gee*, in his judgment, might have paid himself his salary out of the monies he received in January for Mr. *Sawer*, after the deed of composition. At the time he left Mr. *Sawer*’s service, he left the money due to him in Mr. *Sawer*’s hands as a debt; that he was to have interest for it; but does not recollect whether there was any agreement to that effect; does not know whether Mr. *Gee* ever afterwards applied for payment; if he had done so, Mr. *Sawer* does not know whether he had or not the means of paying him.

“Dated 18th June 1838.

Thos. Sawer.”

That the petitioner then asked if the said bankrupt had sworn to that paper, and Mr. *Bell* said, “No;” that the petitioner was proceeding to make some comments upon the said paper, when he was stopped, by Mr. *Bell* declining to hear his observations, as the said Mr. *Bell* said it would be necessary to cross-question him in future; that the petitioner was in the habit of receiving monies on his journies on account of the bankrupt, when in his employ; that the bankrupt continued his business a short time after the petitioner left, but how long the petitioner could not tell; that the last instalment of the said bankrupt could not be paid; that since the petitioner left the bankrupt’s employ, he had repeatedly applied to the bankrupt and his son *John* for his salary, but could not get it.

And the registrar further found, that it appeared, by the examination of the bankrupt, that the petitioner was in the service of the bankrupt upwards of fourteen years; that near the end of February 1837 the bankrupt gave the petitioner notice to leave his service, having a son of sufficient age to take his journies; that the bankrupt had compounded with his creditors for 7s. 6d. in the pound in January previous, which was paid; that the petitioner offered his services for six months, if he could be of any use to the bankrupt; that the bankrupt declined such offer; that the petitioner had never expressed a wish to leave the bankrupt's service; that he left willingly, for the reasons stated by bankrupt; that the bankrupt did not pay his salary when he left; that it was about 250*l.*; that the bankrupt was not then able to pay him; that the bankrupt never recollects interest being mentioned, on the sum being left in his hands; that the petitioner applied for payment of his salary before the fiat issued; that the bankrupt cannot recollect the time; bankrupt was then at Coventry; that the bankrupt was not able to pay him; that the bankrupt had not given any intimation of his dispensing with the services of the petitioner prior to coming off his journey, or before the time mentioned by the bankrupt; that, to the best of the bankrupt's memory, the statement he made to Mr. *Bell* he believed to be correct at the time he made it; that the bankrupt was since satisfied it was incorrect as to the interest, which was never named at the time the petitioner left the bankrupt's employment; that he was not positive at the time he stated it to Mr. *Bell*, as expressed in paper B.; that the bankrupt was since positive that it was incorrect. And the registrar further certified that, from the evidence aforesaid, the petitioner quitted the service of the said bankrupt in the month of February 1837, and

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under such circumstances as are detailed in the said evidence B.

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The petition prayed that the report might be confirmed, and that an advertisement might be inserted in the London Gazette, for the purpose of calling a meeting for the proof of the debt of the petitioner, at the end of twenty-one days from such advertisement; and that the commissioners at such meeting might be at liberty to order, that upon proof of the debt due to the petitioner as clerk or servant of the bankrupt, the petitioner might be paid the sum of 125*l.*, being six months wages or salary, at the rate aforesaid, out of the estate of the bankrupt.

Mr. *K. Parker* for the petition contended that the petitioner was entitled to six months wages in full. The words of the 6 G. 4. c. 16. s. 48. are, "That when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last-mentioned amount." It is true that the petitioner had left the bankrupt's service about nine months before the date of the fiat; but as it was not a voluntary leaving,—as he was obliged to quit, owing to the insolvency of his employer, that cannot disentitle him to the benefit of the section. In *ex parte Saunders (a)* a servant who had left under the

(a) 2 Mont. & Ayr. 684.

like circumstances was held entitled to six months wages in full. (a)

Mr. Bacon for the assignees:—The petitioner was not a servant of the bankrupt at the moment of the bankruptcy, having quitted his service long previously; and it was only such persons who were actually in employ at that time that the statute contemplated. Else any quondam servant who had quitted the service, say for years previously, and had virtually converted the debt into one of ordinary description, would have precedence before other creditors. Here, too, the order for final dividend was made before the petitioner applied.

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Mr. K. Parker in reply.

Sir G. Rose intimated an opinion that the petitioner was entitled to six months wages in full.

Sir John Cross:—I have certainly great doubts whether the benefit claimed by the petitioner is not confined to those who are in the actual service of bankrupts at the date of the bankruptcy. The words of the act seem to bear that construction; for we cannot say that a person who has quitted the service is a servant of the bankrupt. If a creditor has been long since paid off, he cannot be denominated a creditor. But as it is an important point, I will take time before I pronounce a final opinion. I had, however, no notion, when the

(a) See *Ex parte Neal*, Mont. Skinner, 3 Dea. & Ch. 332; Mont. & Mac. 194; *ex parte Grillier*, & Bli. 417; *ex parte Humphreys*, Mont. 264; Mont. & Mac. 95; 3 Dea. & Ch. 114; Mont. & Bli. *ex parte Crawfoot*, Mont. 270; 413; *ex parte Gough*, 3 Dea. & *ex parte Collyer*, 2 Mont. & Ayr. Ch. 189; Mont. & Bli. 417. 29; 4 Dea. & Ch. 520; *ex parte*

1839. former order was made, that the petitioner had quitted
the bankrupt's service so long before the fiat.

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The case stood over.

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The Court now delivered its judgment.

Sir *J. Cross* :—

In this case an order of dividend has been regularly made of 4¼*d.* in the pound; and it is a first and final dividend, the clear produce of bankrupt's estate amounting only to 150*l.*

Shortly after the order was made, and before the payment of the dividends to the creditors, a notice was served on the assignees, on the behalf of the petitioner, of a claim to the amount of about 250*l.*, and of an intention to apply to this Court to stay the dividend, and so admit a proof of the debt. This petition was accordingly presented, and then for the first time, and without any previous application to the commissioners or the assignees, the petitioner claimed to have a moiety of his debt paid in full, in preference to all the other creditors, and that is five sixths of the money ordered to be divided, on the ground that his debt was for a year's wages, as a clerk of the bankrupt, and by virtue of the 48th section of the General Act, which authorizes commissioners to allow the servants and clerks of bankrupts not exceeding six months wages in full, and to admit a proof for a dividend for the residue of what may remain due on account of such wages.

On the hearing of this case it was not disputed by the counsel for the petitioner that this provision of the act was confined to persons in the service of a bankrupt at the time of his bankruptcy, but it was contended

that the petitioner was virtually in the service, though not actually so, because he had left it unwillingly, and *ex parte Saunders*, in 2 *Mont. & Ayr.* 684, was cited as an authority for that construction of the act.

The Court thereupon directed an inquiry before the deputy registrar "at what time and under what circumstances the petitioner left the service," and ordered the payment of the dividend in the meantime to be stayed.

And the registrar has certified that about twelve months before the bankruptcy the bankrupt compounded with his then creditors for seven shillings in the pound, and it was then agreed between him and the petitioner that he should quit the bankrupt's service, and that a year's wages, amounting to 250*l.*, should remain as a debt, instead of being included in the composition. Accordingly, the petitioner then quitted the service, obtained another similar employment, the bankrupt's son succeeded to his place as clerk, and the trade was carried on as before for another year, when this bankruptcy took place.

On the production of the deputy registrar's certificate, and the further hearing of counsel, my learned colleague having pronounced an opinion in which I was not prepared to concur, the case stood over for judgment; and my profound respect for my learned colleague has induced me to give to it the most attentive consideration, but, I am sorry to say, without being able to bring my mind to the same conclusion.

It appears to me, that the only principle on which the legislature has given a preference to the servants and clerks of bankrupts is, that they are greater sufferers than any other creditors by the loss of their employment, and therefore that this is not a case within the intention nor within the terms of the act. And I think *Saunders's* case is wholly different from the present; and

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it appears to have been misunderstood, in consequence of its appearing from the report to have been decided, on the ground of an *involuntary* quitting of the service. The ground on which that case was decided was, that although there was an interval of six months between the quitting of the service and the fiat, yet the servant quitted in consequence of his master having assigned all his estates and effects, and thereupon ceased to carry on his trade, which was an act of bankruptcy, whereby the servant lost his employment as well as his wages.

But even had I thought this petitioner entitled to a half year's wages in full if he had advanced his claim in due time before the commissioners, I am by no means prepared to say, that this Court has original jurisdiction to admit it, and especially after an order of dividend has been duly made. This is, I believe, the first instance of the kind; and even the practice of setting aside orders of dividend to let in further claims, is of very recent date. I can find no instance prior to *Barclay's* case, which came before the Vice Chancellor about eight years ago, and is reported in *Montagu's Reports* (a); and it does not there clearly appear, whether the disallowance of the claim was owing to an omission of the creditor, or to a wrongful rejection of it by the commissioners; but the claim was made in that case, and rejected before the order of dividend was signed.

In the present case the omission to prove was stated to be owing to the illness of the petitioner's solicitor, who had prepared a sufficient affidavit to prove the whole claim as an ordinary debt, but omitted to do so at the proper time.

(a) *Mont. Rep.* 126.

The Chief Judge having heard the petition and the arguments of counsel, and also concurred in directing the inquiry, I have laid the certificate before him, and he thinks that the petitioner is only intitled to come in *pari passu* with the other creditors; and I am of the same opinion.

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Sir G. Rose:—The bankrupt, when in a state of notorious insolvency, was induced to dispense with the petitioner's services, on the ground of an insufficiency of business. The question arises whether the secession disentitles the petitioner to his claim. On a former application it was thought that such cases were admissible. The petitioner's relation with the bankrupt terminated at a period when he was unable to enforce his claim, and it would be going too far to attribute neglect in his not having proceeded against his late employer. Insolvency was undoubted, and could he be said to have neglected his right in not proceeding against his fallen master? The absence between service and bankruptcy is capable of explanation, as well as the delay in presenting a claim after the fiat. But I am unwilling to dissent from the order proposed by my learned colleague, and therefore the petitioner can only be admitted a creditor.

Costs of the assignees, and the costs of an inquiry before the registrar on the termination of service, to be paid out of the estate.

C. of R. *Ex parte* MARTHA EUPHEMIA WILSON. — In
 Jan. 29. the matter of THOMAS MALTBY.
 1889.

On application
 by equitable
 mortgagee for
 leave to bid,
 Court will not
 make order to
 spare her from
 paying deposit
 if declared the
 purchaser.

THIS was a petition of an equitable mortgagee, praying leave to bid at the sale, and that she might be spared from paying a deposit if she should be declared the purchaser.

Mr. *Ellison* for the petition.

Per Curiam : — You must take the usual order for leave to bid; we can make none as to the deposit, but as it is a very reasonable application no doubt it can be so arranged with the assignees.

Usual order for leave to bid. (a)

(a) See *Ex parte Stephens*, 2 Mont. & Ayr. 31; *ex parte Tatham*, re *Sheppard*, 1 Mont. & Ayr. 335; 4 Dea. & Ch. 360.

Ex parte RICHARD LAW, of Manchester, one of the public officers and the manager of the co-partnership carrying on the business of a banker at Manchester and elsewhere under the name of "The Imperial Bank of England."—In the matters of JOHN HILTON BAZLEY, and of the said JOHN HILTON BAZLEY and HUSSEY CHAPMAN.

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A. and B. secretly partners, using the one his name as drawer, and the other his as acceptor of bills, inquiry directed as to their general habit, and whether they intended thereby to bind the partnership estate. A creditor holding such bills proved them first against the separate estate of A. under a separate fiat; then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof is expunged accordingly.—Held, that by receiving the dividend he had not made his election to abide by his separate proof, but on refunding the dividend he might elect to come in under the joint fiat.

THE petition stated the facts.

In and previous to the months of January and February 1838, *John Hilton Bazley* carried on the business of a cotton manufacturer at Manchester in his own sole name.

In January last, the petitioner, as such manager as aforesaid, discounted for *Bazley* a bill of exchange, dated Manchester, 12th January 1838, at three months date, for 90*l.*, drawn by *Bazley* upon and accepted by *Chapman*, and *Bazley* thereupon indorsed the said bill of exchange to the petitioner, and in February then following, the petitioner, as such manager as aforesaid, discounted for *Bazley* three other bills of exchange, at three months date respectively, drawn by *Bazley* upon and accepted by *Chapman*, one of them being dated Manchester, 6th February 1838, for 200*l.*, another of them dated Manchester, 15th February 1838, for 195*l.*, and the other dated Manchester, 23d February 1838, for 260*l.*, and *Bazley* thereupon indorsed the same three several bills to the petitioner.

At the several times when the petitioner discounted these several bills, and for some time previously thereto, and up to and at the date of the second fiat after mentioned, *Chapman* was carrying on the business of a warehouseman in London in his own sole name.

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A fiat, dated the 28th day of May 1838, issued against *Bazley*, by the name, style, or description of *John Hilton Bazley*, of Manchester in the county of Lancaster, cotton manufacturer, dealer, and chapman, and also carrying on business at King Street, Cheapside, in the city of London, in partnership with *Hussey Chapman*, as Manchester warehouseman, and under which he was declared a bankrupt.

A joint fiat, dated the 12th day of June 1838, issued against the above-named bankrupts, by the name, style, or description of *John Hilton Bazley*, of Manchester in the county of Lancaster, manufacturer, and *Hussey Chapman*, of King Street, Cheapside, in the city of London, carrying on business in copartnership at King Street aforesaid as warehousemen, dealers, and chapmen, in the name of the said *Hussey Chapman*, and under which they were declared bankrupts.

Previously to the dishonour of the bill first mentioned, in the month of April 1838, and at the time of discounting the four several bills in manner aforesaid, the petitioner had no notice nor intimation whatever, and had no reason to believe or suspect, and, in fact, did not know, believe, or suspect, that there was any partnership subsisting between the bankrupts, and the petitioner discounted the bills on the understanding and faith that they were wholly unconnected in business as partners, and that the petitioner would have two distinct and separate sureties for payment of the said bills.

On the 19th day of June 1838, the petitioner, as such manager, attended a meeting of creditors under the first-mentioned fiat for the proof of debts, and stated to the commissioners acting in the prosecution thereof the circumstances under which the said bills had been taken by him, and the petitioner was thereupon allowed, without any opposition, to prove; and the petitioner did then,

as such manager, accordingly prove against the estate of *Bazley* 745*l.* upon the four several bills of exchange, being the amount of principal then owing thereon.

On the 14th day of July last the petitioner attended a meeting of creditors under the second-mentioned fiat for the proof of debts, and the commissioners at such meeting, being then fully aware and apprized of the circumstances relating to the bills, allowed the petitioner, without any opposition, to prove, and he accordingly did then prove 745*l.* upon the same bills against the joint estate of *Bazley* and *Chapman*.

In November last the petitioner received a dividend of 2*s.* 4*d.* in the pound upon his proof from the estate of *Bazley*, under the separate fiat.

On the 19th of December last the petitioner was summoned by the commissioners under the second-mentioned fiat to attend before them on Thursday the 29th of December; and the petitioner having accordingly attended on that day, it was proposed to strike out the petitioner's proof against the joint estate of *Bazley* and *Chapman*; and after some discussion, but with considerable reluctance on the part of the said commissioners, they decided to strike out and did thereupon strike out and expunge that proof, on the ground that the bankrupts having been in partnership when the said bills were discounted, although the petitioner was ignorant of the fact, the petitioner's proof under both the said fiats ought not to stand; and the commissioners were of opinion that the petitioner, having already received a dividend upon the estate of *Bazley* under the first-mentioned fiat, had elected to come in under that estate; but they reserved a dividend under *Bazley* and *Chapman's* joint estate upon the petitioner's debt, to await the decision of the present application.

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At the last-mentioned meeting, and before the proof was struck out, the petitioner distinctly offered, if bound to elect then, to come in under the joint estate of *Bazley* and *Chapman*, and to return the dividend received under the estate of *Bazley*.

Prior to the last-mentioned meeting the petitioner had never been informed by the commissioners, and did not know or believe, that he was bound to elect; and at the times when the petitioner proved the debt under both the estates, and when he received a dividend under *Bazley's* estate, the petitioner distinctly understood and believed that he was entitled to prove and receive a dividend under both estates; and the petitioner, by receiving a dividend under *Bazley's* estate, did not intend to elect, and submitted he had not in fact elected to come in under that estate alone.

The petitioner claimed to be entitled to come in and receive a dividend under both estates; but if not, to be entitled to elect under which estate he would come in; and the petition prayed accordingly, that the proof against the joint estate might be restored, or that the petitioner might have his proof restored under that estate, and receive a dividend thereout equally with other creditors; but if not entitled to receive a dividend under both such estates, then that the petitioner might be at liberty to elect under which estate he would come in, with an offer to refund, if necessary.

One of the affidavits in answer to the petition stated, that at the general meeting of the creditors held at the office of the deponent (the solicitor to the separate fiat) in August, a conversation passed between him and the petitioner on the subject of his double proof, when he expressed his opinion to the petitioner against his being able to maintain both proofs, and informed him that he would

be obliged to elect, and that he then showed the petitioner the report of the case of *ex parte Moul*. And the affidavit of Mr. *Goodbrand*, who held bills under similar circumstances, stated that at the meeting for proof of debts and declaration of dividend under the separate fiat (*i. e.* in November) the general question of right to double proof and receipt of dividends was mooted between him and the petitioner and other creditors present, and that an intimation in the negative was given by the commissioners to the deponent and the petitioner; and that upon its being represented to the commissioner that the petitioner had such double proof standing, the commissioner replied, that he had then no official knowledge of such fact, and that if the case were so there would be no doubt that the proof must be struck off from one of the estates.

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Mr. *Swanston* and Mr. *Hardy* for the petitioner:—
We are bound to admit, that after the case of *ex parte Moul* (a) we cannot have a double proof; but we claim to be entitled to exercise an election against which estate we will prove, because what has been done hitherto on our part cannot be construed into an election already made. The mode in which we have proved under the two fiats was fully before the commissioners, who were aware of all the circumstances connected therewith; and it was not until after such double proof, namely in November, that we received a dividend under the separate fiat. In December it was that the question as to our right to make double proof was first raised; and then, being for the first time aware that we had no such right, we immediately claimed a right to elect. But it is said, that by receiving the dividend

(a) *Mont.* 321; *Mont. & Bl.* 28; 1 *Dea. & Ch.* 44; and *id.* 419.

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we had elected; but how could we have elected, when the necessity for so doing had never once occurred to us? [Sir G. Rose:—The receipt of the dividend is not conclusive against you; it is only a circumstance with others to constitute an election.] *Ex parte Bolton* (a) is precisely in point. There it was held that a joint creditor, having sued out two separate commissions, and under one proving his debt against the joint estate, and receiving a dividend, in ignorance of his right to prove against the separate estate of the other, had not elected, but on refunding the dividend it was held he might prove against the latter estate. In *ex parte Husband* (b) indeed it was held that election is gone if the creditor does any act in the character in which he has proved; and if that case were law, it is to be remembered that here the proof stood against both estates; but that was overruled by the Lord Chancellor on appeal (c), which brought that case to the very issue we are for in this which is now before the Court.

Mr. Metcalfe on behalf of the assignees under the joint fiat:—In *ex parte Husband* Sir John Leach thought that waiting till a declaration of the dividend was a sufficient election; and although that opinion was overruled by Lord Eldon, the judgment of the latter only goes the length that a *dividend declared* is not sufficient. Here the dividend was actually *paid*. Neither in that case nor in *ex parte Bolton* was the petitioner aware of his rights prior to the act supposed to constitute the election. But here it is very different. The affidavits show, that before he received the dividend the petitioner was distinctly advised that he could not maintain his

(a) *Buck*, 7; S. C. 2 *Rose*, 389.

(b) 5 *Mad.* 419.

(c) 2 *Gl. & J.* 4.

double proof, and must elect the one or the other. And the case of *ex parte Moulton* was then called to the petitioner's attention, which, though not absolutely binding on the petitioner, was sufficient to set him on inquiry as to the effect of receiving a dividend. In addition to this, upon the subject being mentioned to the commissioners they gave their opinion that the existence of double proof was not properly before them; yet if the petitioner had made double proofs, both could not be maintained, but that one must be struck out. The petitioner was therefore fully apprised of his rights, and was bound to learn what effect receiving a dividend would have. Under these circumstances it would be too great a hardship on the other creditors if he is now to have the prayer of his petition granted.

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Mr. J. Russell for the assignees under the separate fiat asked his costs, the prayer for double proof being abandoned.

Sir John Cross :—When the petitioner received the dividend both proofs were standing, and he was justified in supposing as long as they did so that he would be entitled to dividends on both estates. It was not till long after that one proof was expunged, and he could not till that moment be said to know that he had an option to exercise; as soon as he does know it, at the meeting when his proof was expunged, he claims the right to exercise the option, which till then had not accrued to him. He cannot be said to have made his election by any prior act.

Sir George Rose :—The receipt of the dividend has nothing in it to constitute an election in this case. The assignees seem to admit that the use of the individual

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names was extensive enough to let in the proof against the joint estate; otherwise a question would arise, whether as drawer and acceptor, each party was in this way in the habit of binding the firm. If the assignees think fit, they may take an inquiry, whether by this mode of dealing the bankrupts were in the habit of so binding their firm. The form of the joint fiat does not necessarily lead to the conclusion that they so intended in this particular instance. If they decline taking the inquiry, or the commissioners before whom it is taken find in favour of the petitioner, then the latter will be entitled to elect; otherwise his proof against the separate estate will stand.

The order directed that it should be referred to the commissioners to inquire whether by the use of the separate names the bankrupts were in the habit of binding the firm, and whether in this particular transaction they intended to bind the firm, by such use of their separate names; and if the assignees decline to prosecute such inquiries, or the commissioners find in the affirmative, then the petitioner, on refunding the dividend received, and expunging the proof against the separate estate, to be at liberty to prove against the joint estate. The petition as against the separate estate to be dismissed with costs; and costs of refunding and expunging the separate proof, and of dividing the dividend to be refunded, to be paid by the petitioner. The costs of the assignees of the joint estate, of this petition, and of the reference, if taken, to be paid out of the joint estate.

Ex parte THOMAS SWINBURNE.—In the matter
of HENRY FIELD and JAMES CRANE.

C. of R.
Nov. 13.
1838.

THIS petition stated, that in December 1836 the petitioner struck a docket against the bankrupts, on a debt of 416*l*., and on the 20th January 1837 a meeting of creditors was held, when the bankrupts offered a composition of five shillings in the pound, and to secure it by an assignment of all their effects to trustees; to which the creditors assented, and determined that no farther proceedings should be had under the docket; *and on the express understanding that he should be reimbursed the expense of the docket, the petitioner agreed to the arrangement. Accordingly, an agreement was entered into between the bankrupts and the creditors present at the meeting on the 20th January 1837.*

The agreement was also signed by the bankrupts, but before the signature of the bankrupt Crane had been obtained thereto, Crane was taken in execution at the suit of a creditor for the sum of 160*l*., who had refused to accept the terms offered by the bankrupts; whereupon Crane refused to sign the agreement unless his discharge from custody were procured by satisfaction of such creditor's demand.

Having been appointed trustee, and considering himself empowered by the terms of the agreement to compound the said debt in order to carry the arrangement into effect, the petitioner compounded the demand of 160*l*. for forty pounds, which he paid out of his own pocket, and procured Crane's discharge and the execution by him of the agreement. The petitioner at the date of the agreement was a creditor of the bankrupts to the amount of 416*l*. 12*s*. 2*d*.

A., a creditor, strikes a docket, and then abandons it, in order to give effect to a subsequent trust composition deed, of which he becomes a trustee, and expends money of his own in execution of the trust. A fiat subsequently is issued by another creditor.—Held, that *A.*, having knowledge of an act of bankruptcy when he accepted the trust, had no lien on the estate in his hands for his advances. *Semble* *secus*, if he had been ignorant or mistaken as to the act of bankruptcy under which he struck the docket.

What amounts to an application to prove and a rejection thereof by the Commissioner.

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Shortly after the execution of the agreement the petitioner and his co trustee *Godefry* took possession of the bankrupt's property, but *Godefry* having absconded the petitioner became sole trustee, and sold part of the stock on credit for 200*L.*, and realized upon other parts 212*L.* in cash, or thereabouts, as to which the petitioner could not speak positively, as all the books had been seized by the messenger to the fiat after mentioned. In execution of the trusts the petitioner had expended 280*L.*, and had rendered himself liable to 50*L.*, and there remained a balance in favour of the petitioner of 120*L.* for advances, liabilities, and costs of the docket, in respect of which he claimed a lien on the property delivered up to him; and as against all the creditors who had executed the agreement, he claimed to be paid in full out of the general estate of the bankrupts.

Godefry having absconded, the petitioner applied to Mr. *Simmons*, a party to the agreement, to supply his place in the trust, who declined, but proposed and arranged that his clerk, Mr. *Wilkins*, should accept the office, and Mr. *Simmons* accordingly procured the deed for that purpose to be prepared.

Notwithstanding, on the 15th June 1837, *Simmons* struck a docket against the bankrupts, upon which a fiat issued, and *Simmons* and *Wilkins* were chosen assignees. On the 30th June the messenger seized the property in the hands of the petitioner, with all the books relating thereto.

The petition then proceeded to state, "that several of the creditors who executed the said agreement have proved their debts under the said fiat: that your petitioner attended each of the public meetings before the said commissioner, and stated and urged before the said commissioner at the first meeting, viz., that held

on the 7th of July 1837, your petitioner's lien and claim upon the said property for the said balance of 120*l.*; that the said commissioner stated to your petitioner that he need be under no apprehension about the said balance, as the official assignee and creditor assignees would do every thing that was fair and honourable, and would repay to your petitioner all expences in full which he had been subjected to in carrying on the said agreement: that the solicitor to the said fiat also gave your petitioner an assurance to the same effect: that your petitioner confidently relied on these statements: that your petitioner attended the second meeting, on the 11th day of August 1837, and on that occasion also urged his said claims upon the commissioner: that your petitioner attended repeatedly on the said official assignee for the purpose of having the account of your petitioner taken in his office: that a meeting for a dividend was held on the 14th of this instant month of August, at which your petitioner attended and again urged his lien and claim on the property for the said balance of 120*l.*, and wished to prove for the said sum of 416*l.* 12*s.* 2*d.*; and on your petitioner being informed that the said bankrupts' estate had a set-off against your petitioner, your petitioner pressed for an immediate statement of accounts between your petitioner and the said assignees, and that in the meantime the payment of the dividend might be postponed: that this request of your petitioner was refused, and an order for a dividend was made: that the total amount of the funds now in the hands of the official assignee does not exceed the sum of 160*l.* in cash, after deducting expenses, which he threatens, and intends, in pursuance of the order of the said commissioner, to divide forthwith among the creditors who have proved: that all the

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subsequent assets that will be realized from the said bankrupts' estate will not be near sufficient to pay your petitioner's lien on the said property." And the petition prayed that payment of the dividend to the creditors who had executed the agreement and had proved might be stayed, until the question of the petitioner's lien and claim upon the bankrupts' estate for 120*l.* was decided on, and for a reference to take his accounts, and a declaration that, as against all creditors who had executed the agreement, the petitioner was entitled to and should be paid what was found to have been expended, &c. by him in full out of the estate, previous to the payment of the dividend, and for an account of the debt due to the petitioner prior to the agreement, and for liberty to prove its amount.

Mr. *Swanston* and Mr. *Bacon* for the petition:— Under the circumstances stated in the petition, the petitioner is entitled to the lien he seeks to establish, and even if he be wrong upon that point, he will have a provable debt to that amount, and the Court will now give him leave to prove accordingly, restraining the dividend in the meantime. The commissioners virtually rejected his proof, for what took place at the meeting is equivalent to a rejection; he expressed his desire that a proof should be admitted for the 416*l.*, or else that an account should be taken of what was due to him, neither of which was acceded to.

Mr. *O. Anderdon*, *contra*, was stopped by the Court.

ERSKINE C. J.:—It appears to me, to say the least of it, the commissioners and assignees have acted with great liberality towards the petitioner. Under a mistaken notion that he was duly administering and bene-

officially administering the bankrupts' property, he had continued to deal with it under the trust deed; and if he had had a legal title to the possession of it, he would, in respect of his advances and expenditure, have had a lien against the assignees. But it turns out that his notion was an incorrect one, and that he had no proper authority to deal with the property as he has done. Taking his own statements in his petition to be true, he has no *locus standi*. Prior to the execution of the trust deed he struck the docket, and must have sworn, to the extent of his belief at least, to an act of bankruptcy. He would not have been bound by that, if he could now show that he had been mistaken as to that fact. But this he does not pretend; on the contrary, he states that the only objection to it, if objection it could be called,—the only reason why it was not followed up, was because it was imagined the arrangement proposed by the deed would be more beneficial to the creditors as well as the bankrupts. After an act of bankruptcy so fully established by the petitioner himself, how could he for one moment claim a lien? As to the prayer for liberty to prove, it does not appear that proof was ever rejected, because the petitioner never tendered a proof. He expressed a wish to prove, and all the commissioners did was to order the proof to stand over that an account might be taken; and the assignees then offered to make the petitioner all just allowances in respect of what he had paid under the trust deed. It further appears that the commissioners ordered 127*l.* to be divided among the other creditors, so as to leave sufficient in the hands of the assignees to pay the petitioner his dividend on his debt when proved. All this evinced great liberality towards the petitioner, and I cannot see he has any

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ground of complaint, and certainly there is nothing to warrant him in coming here to stay the dividend.

Sir *John Cross* :—There are no grounds for saying the commissioners had rejected this proof; the petitioner does not say he ever properly tendered the proof or that it was rejected; the affidavits disclose no such case. The question is, whether the act of bankruptcy was previous to the possession taken of the property by the petitioner? Of that there seems no doubt. Ordinarily it is for the assignees to show that a party claiming a lien adverse to the bankruptcy was cognizant of the act of bankruptcy. But here the burden of the converse of that proposition is on the petitioner. *Prima facie* it is to be taken as against the petitioner, owing to his having sworn the affidavit of debt; nor does he dispute it now, nor show that he was misinformed at the time he swore it. The consequence which flows from that state of things is, that he attempted to administer the property under the trust deed, with full knowledge that he was dealing with property distributable in bankruptcy, and not capable of being so administered. He has therefore been thus dealing in his own wrong, and with his eyes open, and has no title whatever against the assignees.

Sir *George Rose* :—The petition sets forth quite enough to put the petitioner out of Court. As already intimated by my learned colleagues, the affidavit sworn by the petitioner is quite sufficient evidence of his knowledge of the act of bankruptcy; the trust deed also amounted to an act of bankruptcy; and therefore the petitioner comes here in every way affected with clear notice of an act of bankruptcy, or claiming under a deed creating one. And if a petition had been pre-

ented against him for delivery up of the property, the most he could ever have asked is what has in liberality been offered, but which he has unwisely refused, namely, an account to be taken and just allowances made for his expenditure.

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Petition dismissed with costs.

Ex parte WILLIAM GRAYDON FAIRMAN.—In the matter of HENRY LLOYD.

C. of R.
Nov. 21,
1838.

THE fiat issued in May 1838, and *Christopher Picard* and *Thomas Worton* were chosen assignees.

In 1825 and 1826 the petitioner advanced the bankrupt various sums, amounting to 2,000*l.*, and in October 1827 a settlement of accounts between them took place; and after several days for deliberation the above sum was found due, and an account current was struck by the bankrupt, and left in his hands for some few days for his consideration, when, on the 23d October 1827, the bankrupt signed an account as follows:—

Mr. Henry Lloyd with Mr. William Graydon Fairman.

Dr.				Cr.			
1825:		£	s.	1827:		£	
Dec. 2.	To cash	-	500 0	Oct. 23.	By cash	-	10
1826:					By bond	-	1,990
— 6.	Ditto	-	500 0				
March 8.	Ditto	-	297 13				
April 24.	Ditto	-	150 0				
May 20.	Ditto	-	300 0				
Sept. 8.	Ditto	-	252 7				
		£	2,000 0			£	2,000

(Signed) Henry Lloyd.

A bankrupt cannot be heard on a petition to prove *pro* or *con.*; (a) and if served, must be paid his costs of appearance. A bankrupt having granted an annuity ten years since, and paid it for ten years, until his bankruptcy, and having at the time of granting it signed an account with the grantor, showing what the consideration was, is precluded from questioning the validity of that consideration, and so are his assignees.

(a) See *ex parte Goodman*, post. 151.

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The petitioner being unwilling to press for immediate payment of this sum, it was agreed that when the bankrupt so signed the account current he should execute a bond bearing even date, whereby the petitioner contracted with the bankrupt for an annuity of 348*l.* 5*s.*, to be paid to the petitioner for life, at the sum of 1,990*l.*, part of the 2,000*l.* then due to the petitioner, "as per account current as aforesaid, for so much money at various times lent and advanced to the bankrupt by the petitioner, as in and by the said bond for securing the said annuity the bankrupt admitted and acknowledged;" and it was agreed that the due payment of the annuity should be secured by the bond and a warrant of attorney, subject to the usual agreement for repurchase of the annuity by the bankrupt.

The warrant of attorney was duly filed, and judgment signed and docketed, and a memorial of the annuity enrolled as follows :—

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A MEMORIAL of an Annuity to be enrolled pursuant to the Act of 53 G. 3. c. 141.

Date of instrument.	Nature of instrument.	Names of parties.	Names of witnesses.	Name of Person by whom annuity to be beneficially received.	Name of person for whose life annuity granted.	Consideration, and how paid.	Amount of Annuity.
23d day of Oct. 1827.	Bond, in penalty of 3,980 <i>l</i> .	Henry Lloyd of New Bond Street, in the county of Middlesex, hatter, to William Graydon Fairman, of St. John Street Road, Clerkewell, gentleman.	William James Bolton of St. John Street Road aforesaid, gentleman.	The said William Graydon Fairman, his executors, administrators, or assigns.	The said Henry Lloyd.	1,990 <i>l</i> . justly due and owing unto the said William Graydon Fairman from the said Henry Lloyd for so much money at various times lent and advanced to him the said Henry Lloyd by the said William Graydon Fairman.	£ s. d. 348 5 0
Same date -	Warrant of attorney to confess judgment for 3,980 <i>l</i> .	The said Henry Lloyd to George Selby and William James Bolton, attorneys of His Majesty's Court of King's Bench.	The said William Bolton.	For securing the same annuity.		—	—

Enrolled at eleven o'clock in the forenoon of the 25th day of October in the year of our Lord 1827.

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The petitioner insured the life of *Lloyd*, and continually paid for insurance at the rate of from four to five per cent., leaving about twelve and a half per cent. clear only to the petitioner.

The bankrupt continued to pay the annuity for about nine years, until he became embarrassed, and during that time never raised the slightest objection either to the account current or the consideration for the annuity.

The petitioner, early in December 1837, was informed by a letter from the bankrupt he had disposed of his business, and would call upon the petitioner and arrange about paying off the annuity bond; and upon making which call, he proposed paying off 1,000*l.* in part discharge of the bond, to which the petitioner assented, agreeing that one half the interest should cease, but that the bond must stand, as the petitioner could do nothing to vitiate that, and that if this was acceded to, the petitioner would act liberally as to the remaining part. Upon which the bankrupt said, "I don't like my friend, Mr. *Woolley*, an attorney, to know that I owe you so much, as I have told him I only owe you 1,000*l.*; I wish you, therefore, to say so when he calls upon you." The petitioner replied, "No; I will not tell a lie for you or any one: but why should Mr. *Woolley* call about your affairs, when you and I know each other so well?"

Mr. *Woolley* afterwards called upon the petitioner, and said that the bankrupt's affairs were so deranged, that a meeting of creditors had taken place, when the petitioner's debt was stated at only 1,000*l.* Mr. *Woolley* therefore attended to offer on their behalf 500*l.*, which the petitioner refused, and informed Mr. *Woolley* his demands on the estate consisted of the outstanding annuity of 1,990*l.*, with the arrears of interest thereon, and two outstanding bills given by the bankrupt in part

of the annuity due some time before, which the bankrupt could not pay in cash, and which the petitioner took in bills. Mr. *Woolley* again called, and said the creditors were soured in ascertaining the petitioner's debt was 2,000*l.*, but they now offered 750*l.*, which the petitioner refused. To which Mr. *Woolley* said, "I will again consult my clients, and let you know the result;" and some time afterwards the petitioner received the following letter from Mr. *Woolley* :

" Sir, Lincoln's Inn, 17th April 1838.

" At my last interview with you on the subject of your claim on Mr. *Lloyd*, late of No. 6, Old Bond Street, I offered you the sum of 750*l.* in discharge of the principal and arrears of the annuity, which you refused. The offer then made was considered as much as the funds would then meet, on consideration that the whole of the funds were to be collected from the debtors on the books, and some of them very speculative.

Since that period the affairs have been further investigated, and the gentlemen find, on inspection of the books, and further claims come in against him in bills of exchange and book debts not then discovered, that they cannot pay that sum, were you even disposed to accept it, and they think it right I should acquaint you with the fact; and I am directed at the same time to make you the following proposal : viz., the annuity to be discharged, and pay you 1,000*l.* for the liquidation of your principal and arrears, and to pay that sum in the following proportions : 6*s.* 8*d.* in six months, 6*s.* 8*d.* in twelve months, with a guarantee to pay those sums, and 6*s.* 8*d.* in eighteen months, provided that sum shall be got in from the funds; if not, so much of the last sum as shall be in the trustees' hands at the end of eighteen

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months. Should this proposal be refused by you, a fiat of bankruptcy will, I fear, be the result, to prevent the bail in the actions against Mr. *Lloyd* being fixed.

"I am, &c. &c.

"*C. A. Woolley.*"

To which the petitioner replied :

"Sir,

"Before I could for a moment think of cancelling a debt of nearly 2,600*l.* for so paltry a sum, secured as 666*l.* 13*s.* 4*d.* at six and twelve months, with a contingency of 333*l.* 6*s.* 8*d.* after eighteen months, I must know a great deal more of Mr. *Henry Lloyd's* concerns than I now do ; and therefore I have to request that you will transmit me a copy of the last statement laid before the creditors. This document I shall submit to the consideration of one or more acute legal friends, as also two or three shrewd intelligent men of business. When I reflect, that the money for my bills dishonoured ought to have been paid ; and the extraordinary fact that I, as the largest creditor, should not have been summoned to these meetings of creditors ; and last, though not least, that so large a sum for the lease and stock was paid away to a few selected persons, instead of being circulated for the general body of creditors, I must think myself exceedingly ill-used ; and if new claims on the estate are now starting up, it naturally creates suspicion in my mind ; and if it should appear that there has been any foul play or base collusion, a bankruptcy will be the only way to bring these things to light, and do justice to all parties. With the statement of affairs, have the goodness to give me the names of the trustees, and how chosen.

"Yours, &c.

"*W. G. Fairman.*"

In reply Mr. *Woolley* wrote :

“ Sir, Lincoln’s Inn, 24th April 1838.

“ The creditors of *Henry Lloyd* desired me to say, in reply to your letter addressed to me, though virtually to them, when they consider you have been receiving seventeen and a half per cent. for ten years, on so large a sum as 2,000*l.*, and of which sum of 2,000*l.* there is no actual appearance of its ever having been advanced, and not only the seventeen and a half, but a further percentage on the bills you took for your annuity, making it nearer twenty-five per cent.; and this ruinous percentage being paid you, it has been paid out of their pockets, and not out of Mr. *Lloyd*’s, and by it you have received nearly 4,000*l.* for your supposed advance of 2,000*l.*; they are content with themselves that they have offered so liberally as they have, and they have done all they intend doing. Further, in reply to your allusion of not being summoned to attend any meetings, they were not aware, at the time those meetings were convened, that you had any claim on them until after 4th June next; and your deed gave you no authority to interfere. The creditors do not fear that the Commissioners under the fiat, which you seem to covet, will put your claim in its proper footing.

“ I am, &c.

“ *C. A. Woolley.*”

To which the petitioner sent no reply.

Shortly afterwards Mr. *Picard*, one of the assignees, called, and wished to know whether the petitioner would accept the offer made. The petitioner, believing Mr. *Picard*’s statements of the bankrupt’s affairs were correct, said, if his debt was set at 1,500*l.* he would relinquish the remainder, which if declined a bankruptcy must ensue, as the petitioner would have the affairs investigated, and felt satisfied he should then

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be in a better position under the fiat. On the 17th day of May a fiat was issued; the petitioner attended on the 28th May, to prove his debt, but it was not gone into; the petitioner again attended on the 29th June, and relying on his annuity bond, the account current signed by the bankrupt *Henry Lloyd*, and backed by the judgment at law, attended without counsel or any professional assistance. Mr. *Manning*, for the creditors, called upon the petitioner to state the original consideration for which the bond had been given; upon which the petitioner handed in the account current, and was examined thereon, but from memory was unable minutely to state the precise way in which these sums were made up, but stated that every shilling of the consideration had been decidedly paid, and put in the account current and the annuity bond as evidence, both signed by the bankrupt. On the 6th July the petitioner was again examined by adjournment, not only as to the annuity, but upon a variety of other transactions, including bills quite unconnected with the consideration for the annuity; all knowledge of which had escaped the petitioner's recollection, from the circumstances having occurred many years before. The petitioner again attended on the 18th October, being a dividend meeting, and desired to prove his debt. The commissioner, Mr. *Merivale*, then examined the bankrupt, and asked if he admitted the consideration; he said he only admitted 1,550*l.*: he was then asked, whether he admitted the account current, and his signature to it; he said the signature to it was his: he was then asked, why he had signed the account current if it was not correct; he said he had trusted to *Jones* his managing man: he then was asked when he received the account current, and he said he had received it some days previously to its signature. The commis-

sioner, Mr. *Merivale*, would not suffer the proof to be made, as the consideration was disputed, and not having the judgment at law before him to sanction the proof. The petitioner gave the best explanation of the accounts in his power from memory, but was unable to account for every shilling after the lapse of time, as the petitioner had been in the habit of destroying all papers of above seven years standing, relying upon the statute of limitations; never having kept any books, he therefore was unable to produce any papers to refresh his memory, so as to prove precisely how the sums were paid; but the petitioner's general idea was, that the two first items of 500*l.* were paid in cheques, which Mr. *Manning* admitted, on behalf of the estate; and that the four following items in the account current, making 1,000*l.*, were paid in trifling loans, I. O. U's. for money lent, or bills of the bankrupt given up at maturity, which ultimately amounted to the aggregate sum set forth in the account current.

The petition prayed that the petitioner might be allowed to prove his debt against the bankrupt's estate.

The further facts are noticed sufficiently in the arguments.

Mr. *J. Russell*: — The commissioner has improperly rejected this proof. It is now upwards of ten years since the grant of the annuity was executed, and during all that period, until his bankruptcy, the bankrupt has continued to pay the annuity. If any thing wrong had been done he ought to have complained long since in the Court in which judgment on the warrant of attorney was entered up, so as to set it aside; and not at this late period of time have resorted, through his assignees, to the dilatory and expensive process of the

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1838. Court of Chancery. A bill being filed the petitioner, if the Court thinks fit, is ready to try the question upon it; and he only asks, that dividends on the amount of his annuity may be set apart to answer his claim in the event of a result favourable to him.

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The Court called on

Mr. *Swanston* and Mr. *Manning* for the assignees, who contended that the annuity was void; 1st, on the ground of fraud; 2dly, because the requisites of the 53 Geo. 3. c. 141. s. 2., namely, that the true consideration and mode of payment should be set forth in the memorial enrolled in Chancery, were not complied with; and, 3dly, because the memorial stated it to be for monies lent, whereas it appeared to be for principal, and the interest due on it. In his examination before the commissioners the petitioner admitted that part of the consideration consisted of bills discounted by him for the bankrupt, and that on some of them the amount of the discount was deducted. From the bankrupt's evidence it also appears, that of the 1,990*l.* the 540*l.* was never received; and although he thus falsifies his own act and acknowledgment on executing the deed, yet a court of equity will look to the actual facts of the case, and not bind a man, as a court of law does, by that which he acknowledges when perhaps under the pressure of pecuniary difficulties.

Mr. *Bilton*, for the bankrupt, referred to the case of *ex parte Shaw*. (a)

ERSKINE, C. J. (without calling on Mr. *Russell* to reply):—The bankrupt cannot be heard on a question of proof, especially as he is still uncertificated, except

(a) 5 *Ves.* 620.

to cite cases as *amicus curiæ*; though if served with the petition he will be entitled to his costs. This case turns on the fact, whether the 1,990*l.* was really advanced by the petitioner. If it rested on the examination of the petitioner, from the imperfect recollection he seems to have of his case, some doubt might exist; but, independent of the deed, the bankrupt has in another instrument, namely, the settled accounts, admitted that the whole 1,990*l.* was owing by him; and by his voluntary admission, disclosed by his affidavit, he has continued to pay this annuity for ten years, with as perfect a knowledge of facts all that time as he can have at this moment. Can we, under these circumstances, give credence to his present statement, that 540*l.* of the consideration money was never paid to him? I think not. After such a lapse of time, paying the full annuity without taking any measures to set it aside, it is too late to dispute the consideration.

Sir *John Cross*: — I am of the same opinion. This annuity was granted so many years back, and acquiesced in by the bankrupt for so long, that, in deciding as to the validity of the consideration, we are the rather justified in following the import of written evidence than trusting to the memory and biassed testimony of the bankrupt grantor. The two documents already alluded to, strengthened as they are by long acquiescence, satisfy my mind that the full consideration was paid long since. I am at a loss to discover why the assignees should have filed the bill in chancery, in this state of the proceedings, to set aside the annuity. They cause the proof to be rejected, and so long as it remains unadmitted they are no sufferers, whether the annuity was valid or invalid. Had they allowed the proof to be made in the first instance, then filing the bill might

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have been justified. Under the circumstances, the petitioner is fully entitled to have the prayer of his petition granted.

Sir *G. Rose* concurred, and suggested that the petitioner should have his costs out of the estate.

Ordered, That the petitioner should be at liberty to enter a claim to abide the event of the bill filed, and a sufficient fund reserved to meet any future dividends. Costs of both parties out of the estate. The petitioner to pay the costs of the bankrupt's appearance.

C. of R.
 Jan. 25,
 1839.

Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor, where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other.

Ex parte JOSEPH HAMMOND and RICHARD HODGSON SMITH, Assignees. — In the matter of THOMAS WHITHALL JACKSON and THOMAS WILLIAMS.

IN September 1836 a fiat issued against the bankrupts, on the petition of *Richard Hodgson Smith* and *Samuel Hodgson Smith*.

The petitioner, *Richard Hodgson Smith*, proved a debt of 100*L.* and upwards; but the petitioner, *Joseph Hammond*, was not a creditor, and became an assignee, at the request of the creditors.

The petitioning creditors employed *John Phillips*, since deceased, as their solicitor, in suing out the said fiat; and *Phillips* made out a bill of costs up to the choice of assignees under the fiat.

The bill had been taxed by the commissioners at the sum of 52*L.* 19*s.* 1*d.*, and, so taxed, had been filed with the proceedings.

By a memorandum under their hands, dated the

28th day of September 1836, the commissioners directed the amount so taxed and ascertained to be paid, and the petitioners subsequently paid the same accordingly. But it was alleged that the bill so taxed and paid contained various improper charges, some of which were set forth.

Phillips died in January 1837, and letters of administration of his estate and effects were granted to *Jane Jackson*, wife of *Samuel Jackson*.

A bill of costs of *Phillips*, subsequently to the choice of assignees under the fiat, was made out by the administratrix, and was taxed by the commissioners at 23*l.* 2*s.* 6*d.*, which it was also alleged contained various improper charges.

Jackson, and his wife as administratrix, commenced an action against the petitioner, to recover the bill of costs subsequently to the choice, the amount of the plaintiff's claim, as indorsed on the writ issued, being 28*l.* 7*s.* 1*d.*; but in the particulars of the plaintiff's demand, delivered therein, they claimed the sum of 71*l.* 7*s.* 1*d.*

The following being a copy of such particulars:—

“ In the Exchequer.

“ Between *Samuel Jackson* and *Jane* his wife, administratrix of *John Phillips*, deceased, plaintiffs; *Joseph Hammond* and *Richard Hodgson Smyth*, defendants.

“ This action is brought to recover the sum of 71*l.* 7*s.* 1*d.* due from the defendants to the said *Samuel Jackson* and *Jane* his wife, as administratrix of *John Phillips* deceased, for business done by the said *John Phillips* in the year 1836, as the attorney and solicitor for the defendants, and for money paid, laid out, and expended by the said *John Phillips* in that character for the use and at the request of the defendants, the full particulars of which exceed three folios.

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Ex parte
HAMMOND
and another.
In the matter
of
JACKSON
and another.

Mr. West for the assignees:—The practice at common law is, that if an action be brought on a bill of costs, which on taxation is afterwards reduced by more than one sixth, neither party receives the costs of taxation; and although in this case we must pay the costs of the action, yet the costs of taxation of the second bill for which the action is brought would not be allowed to the plaintiff; and as the first bill had nothing to do with the action, and the plaintiff refused to allow it to be taxed under the judge's order, by which the expense of this petition would have been avoided, we submit that the plaintiff should pay the costs of this petition, and of taxation of the first bill, and of the present application, and such costs ought to be set off against the balance due to the plaintiff and the costs of such action.

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Ex parte
HAMMOND
and another.
In the matter
of
JACKSON
and another.

Mr. Swanston, *contra*: — *Weston v. Pool* (a) and in re *Cole* (b) establish, that if a bill of costs is taxed after the solicitor's death, his representatives will not be ordered to pay the costs of taxation, although more than a sixth is deducted. Neither did the words of 2 Geo. 2. c. 23. authorize such a taxation.

Mr. West in reply: — Admitting we have no *locus standi* upon the authority of those cases, or the statute, we apply here under the general jurisdiction of this Court, which is vested by the statute with a discretion as to costs. The question is, if we may not set off these costs, for here we have a fund in hand which the plaintiffs at law claim, and there is no difficulty similar to that which exists in most cases arising from the confusion to which the intestate's assets might be liable.

(a) 2 Stra. 1056.

(b) 2 S. & S. 467.

1839.

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Ex parte
 HAMMOND
 and another.
 In the matter
 of
 JACKSON
 and another.

The Court thought that no set off could be allowed, except upon the principle of ordering payment, which the cases showed could not be claimed in this case. The intestate might have known that if he went to taxation more than a sixth would have been taken off, and might not have carried his bill to taxation; but the plaintiff as administratrix could not have been possessed of sufficient knowledge in the business. No order can be made as to the set off.

Certificate of the registrar confirmed. (a)

C. of R.
 Nov. 9,
 1838.

Ex parte BUTTERWORTH. — In the matter of
 BUTTERWORTH.

Upon an application to supersede under the composition clause, it is not necessary that the commissioner shall certify that no creditor to the amount of 50*l.* resides out of the jurisdiction, or that the assignees have assented.

THIS was an application by the bankrupt to annul the fiat, under the composition clause, 6 G. 4. c. 16. s. 133. (b) The inducement to mention it to the Court

(a) See the case of *Maddeford* his last examination (whereof and *v. Austwick*, 3 *Mylne & Cr.* 423, of the purport of which twenty-one days notice shall have been given in the *London Gazette*), if the bankrupt or his friends shall make an offer of composition, or security for such composition, which nine tenths in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given; and if at such second meeting nine tenths in number and value of the creditors then present shall also agree to accept

(b) " And be it enacted, that at any meeting of creditors after the bankrupt shall have passed

present shall also agree to accept

was, that two difficulties had been raised in the bankrupt office; 1st, that the commissioner had not certified that no creditor to the amount of 50*l.* was residing out of the jurisdiction, which the officer considered necessary within the words of Lord *Eldon's* order (a); but the Court was of opinion that there was not any thing in this objection; and, 2dly, there was not any evidence of the assignees' assent.

The Court suggested that the order for a supersedeas might go, on taking the proceedings into the office, to show who the assignees were.

1838.

Ex parte
BUTTERWORTH.
In the matter
of
BUTTERWORTH.

such offer, the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the said commission."

(a) 27th June 1826, 2 *G. & J.* xv, which is as follows:—"I do therefore hereby order, that at the first of the said meetings a minute shall be taken by the solicitor of the assignees of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition. And I do order that the second of the said meetings shall be held at a meeting of the commissioners named in each respective commission; and that at such meeting the said commissioners do, by deposition of witnesses and documentary evidence, as to them shall appear to be proper, inquire and ascer-

tain whether the several particulars directed by the said act to be performed previous to the holding of such second meeting have been duly performed; and certify the same to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, together with the proceedings which shall have taken place at such second meeting. And for the better information of all parties interested, I do hereby further order, that the said commissioners do state in such certificate what proportion in number and value the creditors assenting to such composition bear to the creditors who shall have proved debts of the amount of 20*l.* and upwards under the commission; and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same."

C. of R.
March 14,
1839.

ANON.

A London fiat may be issued against a Cheltenham trader, 120 miles from London, when the petitioning creditor, the witnesses to prove the act of bankruptcy, and major part in value of the creditors, reside in London.

THIS was an application by a London creditor, that a fiat against a Cheltenham bankrupt might be issued to the Court of Bankruptcy in London, Cheltenham being one hundred and twenty miles from London, and the petitioning creditor, the witnesses to prove the act of bankruptcy, and the major part in value of the creditors, resided in London.

Ordered. Bankrupt's expenses to attend meeting to surrender to be paid by the petitioning creditor. (a)

C. of R.
March 23,
1839.

ANON.

The residence in London of all the creditors but one not a sufficient reason for issuing a London fiat against a country trader.

THIS was an application that a Birmingham fiat against a trader residing at Birmingham should be issued to London, all the creditors but one being in London, and offering to pay the bankrupt's expenses.

Sir *John Cross* :— The general rule is, that a fiat must issue to the place where the trader resides, from which there must be an urgent reason to deviate. The excuse in this case does not appear to me to be sufficient, although my inclination is, to prefer a London to a country fiat.

(a) See *ex parte Grigg*, ante 39.

In the matter of BINKS.

MR. KEENE applied to remove the fiat from Barnard's Castle to London, where the bankrupt carried on business, but had no creditors there; the principal body resided in London, and many at Liverpool and Manchester.

Application refused.

C. of R.
April 16,
1839.

The non-existence of creditors at the place to which a country fiat is issued, is not a sufficient reason for its removal.

Ex parte ELIZABETH FORRESTER.—In the matter of THOMAS HARVEY FORRESTER.

C. of R.
April 18,
1839.

ISAAC LITTLEDALE was appointed executor of the will of *William Forrester*, who gave the interest of his property to five different cousins, one of whom was the petitioner, the bankrupt being another, for life. *Littledale*, by direction of the testator, appointed the bankrupt his agent, who applied 4,829*l.*, part of the trust funds, to his own use. The petition stated that the bankrupt had not surrendered, and consequently there was no person authorized to prove the 4,829*l.*, without the order of the Court.

Mode of proving against a bankrupt trustee and agent.

The petition prayed that the petitioner might be at liberty, on behalf of herself and the other legatees, to prove for the 4,829*l.*, or a reference to the commissioner.

Mr. Keene, for the petitioner, referred to *ex parte Turpin (a)* in the matter of *Brown*.

(a) 1 *Dea. & Ch.* 120; 1 *Mont. & Bli.* 443.

1839.

Mr. *Ellison* for the assignees.

Ex parte
FORRESTER.
 In the matter
 of
FORRESTER.

The Court made the common order for the petitioner to go in and prove; the petitioner's costs to come out of the trust fund, and the assignees' out of the bankrupt's estate; but declined, at present, to make any order as to the bankrupt's fifth part, giving liberty to apply in respect of it after proof made.



C. of R.
April 26,
 1839.

In the matter of SMITH WRIGHT.

An application to remove a fiat, and, if not, that the petitioning creditor's affidavit may be received, cannot be united in the same application.

MR. SWANSTON applied to remove the fiat from Norfolk to London. The debts amounted to 14,000*l.*, and creditors to the amount of 10,000*l.* were anxious for the removal.

Per Curiam:—We see no reason to take the case out of the general rule.

Application refused.

Mr. *Swanston* then asked that the petitioning creditor's attendance at the opening of the fiat might be dispensed with.

Per Curiam:—That must be the subject of a separate application.

Refused also. (a)

(a) In the matter of *Hilliar*, 17th July 1839, on the application of Mr. *Beavan*, the Court came to the same determination.

In the matter of MANSFIELD.

C. of R.
April 26,
1839.

MR. BICHNER applied to remove the fiat from Shepton Mallet to London; the object of the fiat was to set aside a cognovit to a preferred creditor. The petitioners were the only creditors whose debt was large enough to constitute a good petitioning creditors debt, and the witnesses to prove the act of bankruptcy resided in London.

A country fiat will not be removed because the petitioning creditor and witness to prove the act of bankruptcy reside in London, and they are small creditors in the country, and the object is to invalidate a preference.

Sir J. Cross:—The validity of the cognovit must be ascertained before the country commissioners, and proved by persons who most likely reside in the bankrupt's neighbourhood.

Application refused.

In the matter of GEACH.

C. of R.
April 27,
1839.

MR. ROSE made a similar application to remove the fiat from Pontypool to Bristol. Two of the commissioners were creditors, two others resided at a considerable distance, and the fifth generally declined to attend, so that there were in fact but two who could by possibility be procured to act. The debts amounted to 60,000*l.*, and only four of the creditors resided in the neighbourhood of Pontypool.

If two of the commissioners are creditors, and two reside at a distance, and the fifth generally declines to attend, and only four out of 60,000*l.* creditors reside in the neighbourhood of the place, the fiat will be removed to London.

The Court of Review refused the application. But **Mr. Swanston** applied to the Lord Chancellor, who granted the application.

May 1.

C. of R.
April 30,
1839.

The residence of the major part of the creditors and the petitioning creditor in London not a sufficient reason for removing a country fiat.

ANON.

MR. L. WIGRAM applied to remove a fiat from Birmingham to London, the major part of the creditors and the petitioning creditor residing in London.

Application refused.

In the matter of ALLEN.

C. of R.
May 24,
1839.

Where a country fiat will not be changed.

MR. Rogers applied to remove the fiat from Alton, where the bankrupt resided, forty-nine miles from London. Out of eighteen principal creditors, the petitioning creditor and twelve others resided in London, three only resided within six miles of Alton, one at Farnham, ten miles from Alton, and one at Newbury, thirty miles from London. The nearest list to Alton was at Basingstoke, twelve miles off, and the commissioners resided twenty-five miles from Basingstoke. If worked at Alton it would cause delay and increase of expense to the estate.

Refused.

C. of R.
March 13,
1839.

A. applies to B. for a loan on mortgage. B. lends the amount on a three months bill, renewable; A. verbally agreeing to pay 10½ per cent. interest. The bill becomes due, but was not renewed for three weeks after, when another was accepted at three months date, at a like rate of interest for the three months and three weeks; and five renewals were made in the same way. Held, that the transaction was usurious, and not within the protection of the 3 & 4 W. 4. c. 98. s. 7.

Ex parte TERREWEST. — In the matter of POYNTER. (a)

MR. ANDERDON for the petition cited *ex parte Knight*. (b)

Mr. Swanston *contra*.

Cir. ad. vult.

The points are so fully stated in the judgment that we have ventured to omit the arguments.

(a) An appeal from this decision is pending before the Lord Chancellor.

(b) 2 M. & A. 568. S. C. 1 Dea. 459.

Sir J. Cross:—

In this case the petitioner claims a debt of 1,137*l.*, the residue of a loan of 1,600*l.*, secured by the bankrupt's promissory note; and the question is, whether the contract was usurious?

The circumstances of the case as stated by the petitioner are as follow: the bankrupt, about two years before his failure, had occasion to borrow a sum of 1,600*l.* on a mortgage of an estate which he intended at a convenient opportunity to sell. He applied to Mr. *Terrewest*, a solicitor, to procure the loan. Some impediment arose about the title, and the solicitor then offered to advance the money himself on the bankrupt's promissory note payable three months after date, and renewable from time to time at the option of the borrower, for a period not exceeding eighteen months, the bankrupt agreeing verbally to pay interest at the rate of ten and a half per cent. per annum, until the estate should be sold.

The petitioner further states that the money was to be lent on such renewable notes in order to bring the matter within the new act of parliament, meaning the 3 & 4 W. 4. c. 98. s. 7, which authorizes any *rate of interest* to be paid on money advanced upon bills or notes payable within three months. The money was accordingly advanced to the bankrupt on the 9th July 1835, and he thereupon gave his first promissory note payable three months after date, and returned the lender forty-two pounds, the amount of the stipulated interest for three months.

That note was not immediately renewed upon its becoming due, nor till about three weeks afterwards. It was renewed for the next three months on the payment of the same rate of interest for that period, and a like rate for the interval of three weeks; and in this

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way four successive renewals were made, and each time a similar payment; and it is on the fifth note the present claim is made for a balance of principal and interest, the residue having been paid.

There are two objections to this claim; first, that the transaction is not in conformity to the act of parliament; and secondly, that if it were, the form was merely colourable; and we are of opinion these objections are well founded.

The act appears to be applicable only to bills and notes existing at the time the contract is made for discounting, negotiating, or transferring the same, and to loans specifically made thereon. But no money was advanced on this fifth note. It was drawn, and interest at the rate of ten and a half per cent. was paid, in consideration of the forbearance of a pre-existing debt; a case which, if real, does not seem to come within the intention of the act, for if so it would be applicable to all simple contract debts, and in effect repeal all the laws made for the prevention of usury in such contracts.

But be that as it may we are of opinion that in fact the loan was advanced, and the interest paid on one entire continuous contract; and that the fabrication of a series of notes renewable every three months, instead of a single note for a longer or an indefinite time, was merely a shift and colourable contrivance to evade the usury laws, which no court of law or equity can sanction.

The petitioner's claim must therefore be rejected as regards the debt upon the note, and consequently as regards the real security subsequently given, and the petition be dismissed with costs.

Ex parte JOSEPH ROSE. — In the matter of
JOSEPH ROSE.

C. of R.
May 22,
1839.

MR. SWANSTON and Mr. *Rogers* applied to the Court for an order directing that an affidavit by Mr. *Gibson*, in a process under the 8th section of the 1 & 2 Vict. c. 110. commonly called the act for the abolition of arrest for debt on mesne process, should be taken off the file. This section declares that, on affidavit of debt in the Court of Bankruptcy, with notice to the debtor, the latter failing payment or not tendering sufficient security within twenty-one days shall be deemed to have committed an act of bankruptcy, and subjected himself to the issue of a fiat, if a trader. Mr. *Rose* alleged that Mr. *Gibson* had harassed him by filing two affidavits of debt in the same matter. On the 20th ult. an affidavit was filed, alleging a debt to Mr. *Gibson* and partner in the amount of 100*l.* and upwards on certain bills of exchange; and on the 22d the deponent was served with a copy of the affidavit, and notice of a demand for 3,612*l.* within the period required by the statute; security was tendered, and a bond for 200*l.* approved by Sir *C. Williams*, one of the commissioners. On the 29th another affidavit was filed, alleging a debt to Messrs. *Gibson* and *Taylor* to the amount of 3,612*l.*, with new notice for payment or security. It was now submitted that the second affidavit ought to be taken off the file, it having been made in reference to the same debt, and it being sworn that no other existed. The debtor had complied with the exigency of the statute, and ought to be relieved from the latter proceeding and the danger of any future result. It was a fixed principle that no man should be

The Court will not order a second amended affidavit under the 1 & 2 Vict. c. 110. s. 8. for the same debt to be taken off the file.

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ROSE.
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of
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held twice to bail on the same action. The process of the Court ought not to be abused, neither ought this gentleman to be brought a second time from Manchester to give security before the commissioner.

Mr. *Bagshaw* appeared for the respondent.

Sir *John Cross* said the application was on a first impression, and without precedent; the first affidavit, perhaps inadvertently, instead of specifying the whole amount, alleged only a debt of 100*L*. and upwards; and the commissioner, having no legal evidence of a higher debt than 100*L*., accepted a bond for payment of 200*L*., or whatever amount might be found due. The creditor finding he had failed in his object, as to security for the full amount, filed a new affidavit, and there was no law to prohibit him. No ground existed to warrant the Court in ordering the affidavit to be taken off the file. It might perhaps become questionable whether the applicant was not entitled to costs on his first appearance, which proved to be unnecessary.

Sir *George Rose* said it was a question for the consideration of the commissioner, when regulating the security to be given. The proceeding was open to objection as an act of bankruptcy, but there were no grounds for taking the affidavit off the file. If the act of bankruptcy should turn out to be good, it would stand; if not, it could be dealt with accordingly, either by action at law or application for a supersedeas.

Application refused, with costs.

Ex parte MINERVA GOODMAN, executrix of BARTHOLOMEW GOODMAN.—In the matter of JOHN H. NAINBY.

C. of R.
April 18,
1839.

THIS petition prayed liberty to prove a debt of 73*l.*, which had been rejected by the commissioners; and it stated that the bankrupt being indebted to *Bartholomew Goodman* in the sum of 32*l.*, the latter commenced an action against him, and obtained judgment, and in Michaelmas Term 1830 took the bankrupt in execution for 73*l.* debt and costs; from which time down to the 13th June 1838 (long subsequent to the bankruptcy) he continued a prisoner in the Queen's Bench prison.

On the 6th October 1837 the fiat issued, and *W. Lambert* and *D. Hirschel* were chosen assignees. Shortly before the date of the fiat *B. Goodman* died, having made his will, appointing his wife, the petitioner, sole executrix. A dividend had lately been declared, and the petitioner, as executrix, on the 14th March 1839, applied to prove under the fiat on the judgment, but was opposed on the allegation that the bankrupt had, in June 1838, served the petitioner with a summons to show cause, before Lord *Denman*, why he should not be discharged out of custody. The action having abated by the death of the plaintiff, and judgment not having been revived, Mr. Commissioner *Merivale* rejected the proof upon this objection, considering that, as the bankrupt had been discharged unconditionally from prison, the debt was gone in law. From the affidavits it appeared that Lord *Denman*'s order to discharge the bankrupt was in the ordinary form, the petitioner not having appeared upon the summons. The petitioner appealed from this decision of the commissioner, and applied for leave to prove.

A creditor having his debtor in execution dies. A fiat issues against the debtor, who some time after obtains a judge's order for his discharge, which the executor of the creditor, though served with notice, does not oppose. Held, that the debt was not extinguished, but that the executor might prove it against the bankrupt's estate.

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 In the matter
 of
 NAINBY.

Mr. *Bethell* for the petitioner:—The bankrupt might have obtained his discharge much sooner than he did. It was his own fault that he remained in custody one moment after the death of the testator, provided the judgment were not revived by *scire facias*. The petitioner did not detain him in prison, but he kept himself there; and under such circumstances it cannot be said that his stay there was a satisfaction of the debt. No interval of time has yet been assigned beyond which a creditor, having taken his debtor in execution, shall be precluded from discharging him, and suing out a fiat or proving a debt.

Mr. *Rogers* and Mr. *Petersdoff*, for the bankrupt, contended they had a right to be heard in respect of the surplus coming to the bankrupt; all debts (as was alleged) having been paid with interest.

Mr. *Bethell* objecting to their appearing, the Court determined they had no right to be heard. (a)

Mr. *Steele* for the assignees:—The omission of the petitioner to attend the warrant amounts to a voluntary discharge of the debtor, and is tantamount to a release, especially as the judgment might have been revived by *scire facias*. [Sir *John Cross*:—In *ex parte Knowell* (b) the bankrupt was taken in execution after the bankruptcy, and that was held to debar the right of the creditor to prove; and Lord *Eldon* there says, “Considering the bankruptcy out of the case, it is clear that by taking the body in execution the debt is satisfied to all intents and purposes.” But he adds, “If the debtor being in execution becomes bankrupt, the creditor in

(a) See *ex parte Fairman*, ante, p. 125.

(b) 13 Ves. 192.

reason and justice must have a right to elect; not having contemplated that event which deprives him of the fruit of his execution." His Honor also referred to *Pyne v. Erle* (a) and *Broughton v. Martin*. (b)] The consequences of a regular execution, however obtained, are to extinguish the debt. (c) All the authorities show that; and it has been held that the creditor, having taken his debtor in execution, cannot sue out a commission of bankruptcy; *Cohen v. Cunningham* (d), which recognizes *Burnaby's* case (e) as law; so in *Goddard v. Vanderleyden* (f); neither can such creditor set off a sum recovered in an action by his debtor, *Taylor v. Waters* (g); so if the defendant is discharged out of custody on terms consented to, which are not afterwards fulfilled, the old debt is gone, *Vigors v. Aldrich* (h); so if so discharged on fresh security which proves invalid, *Jaques v. Withy* (i); so though it is expressly agreed that defendant is to be retaken in case of need, *Blackburn v. Stupard*. (k) So that in this case, the bankrupt having been discharged, no *capias satisfaciendum*, *feri facias*, or *elegit* could issue against him; and consequently the debt is actually to all intents and purposes gone. If the debt is destroyed at law, what debt is there to prove? None; for a provable claim and legal debt are identical; and it is clearly established that a Court of Equity will not lend its assistance to revive it, *Horn v. Horn* (l) and *ex parte Knowell*. (m)

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(a) 8 T.R. 407.

(b) 1 Bos. & P. 176.

(c) Hob. 57.

(d) 8 T.R. 123.

(e) 1 Stra. 653.

(f) 3 Wils. 271.

(g) 5 Maule & S. 103. S.C.

2 Chit. Rep. 303.

(h) 4 Bur. 2482, quoted 6 T.R. 536.

(i) 1 T.R. 557.

(k) 2 East, 245.

(l) Ambler. 79.

(m) 13 Ves. 192.

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Mr. *Bethell*, in reply, was stopped by the Court.

Ex parte
GOODMAN.
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of
NAINBY.

Sir *John Cross* :— There is no question but that at the time of the bankruptcy this judgment debt was in existence unpaid. The action having previously abated by the death of the testator, *Bartholomew Goodman*, and the bankrupt remaining in custody until after the fiat, he proceeded to procure his discharge, and served a summons upon the petitioner for that purpose. To this the petitioner had no objection; it being then a matter of perfect indifference to her, as she had acquired the right to prove, and the discharge could not affect her. If the original creditor had been living, and bankruptcy had ensued, he could have discharged the debtor at any time, and have proved against his estate. His executrix has virtually adopted this course; for she abandoned the right she had to detain him in prison, by a revival of the judgment by *scire facias*, and applied to the commissioner to prove. As to the effect of his continuing in prison so long after the death of the testator, it was the debtor's own fault, for he might have exercised his right of discharge the moment after the testator's death. The only question here raised is, whether the order of Lord *Denman* did or not operate as an extinguishment of the debt? I apprehend not; and I can entertain no doubt as to the petitioner's right to prove.

Sir *George Rose* :—The only question in this case is, whether the petitioner, as executrix, by keeping the debtor in prison so long, has elected her remedy against his body, abandoning that against his property. But any argument in favour of the affirmative of that proposition is met at once by the circumstance, that it was the bankrupt's own act, or rather neglect, that detained

him in custody. Execution, in the eye of the bankrupt laws, is merely regarded as security; and having a bankrupt debtor in execution, you may at any time come and prove against his estate; and the only question to arise is, how far you can disturb former dividends or dealings with the estate under the bankruptcy? But if you take the estate as you find it, the right to prove is undeniable. Upon thus proving the debtor would be entitled, by the election made, to his immediate discharge. If a discharge on bankruptcy is to operate as an extinguishment of debt at all, it would so operate as well if after proof as before; and thus by proving and entitling the bankrupt to his discharge, you extinguish the debt, and become liable to have the proof expunged as of a debt paid;—which would amount to an absurdity. Here nothing more than execution is gone, and the moment that is taken off the right to go against the assets is revived. If the debt had been discharged by Lord *Denman's* order,—if that had directed satisfaction to have been entered up on the judgment, the debt would have been extinguished for all purposes, whether of proof in bankruptcy or otherwise. But it is not so here; that order only directed a discharge *sub modo*; and therefore I think there is nothing to disentitle the petitioner to what she now seeks.

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Ex parte
GOODMAN.
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of
NAINBY.

Common order for leave to go in and prove.

C. of R.
April 23,
1839.

To entitle a petitioner to an order to prove in the absence of an appearance for assignees, service of the petition on the solicitor to fiat, who had undertaken to accept service, is not sufficient; it must be served on them personally.

Semble, a petition to prove must state grounds why commissioner rejected the proof.

Ex parte BAKER. — In the matter of SCOTT.

THIS was a petition to prove: and on its being called on, no counsel appeared for the assignees.

Mr. *T. Parker* for the petitioner: — The solicitor for the assignees had, on application made to him, undertaken to accept service of the petitioner on their behalf; and he has been served accordingly. The assignees not appearing, the petitioner is therefore entitled to the order as prayed.

Per Curiam: — The service is not sufficient. The petition should have been served on the assignees personally to have entitled you to take an order in their absence.

Afterwards on the same day Mr. *Dixon* appeared for the assignees, and on the petition being opened he objected that it did not show the grounds on which the commissioner had rejected the proof, and he cited *ex parte Worth*. (a)

The Court seemed to think this necessary, and the petition stood over. (b)

C. of R.
April 22,
1839.

Mode of proof
by bankrupt
executor.

Ex parte COLLINGDON. — In the matter of
ANDERSON.

MR. *BETHELL* applied, that the petitioner might prove against the bankrupt's estate. The bankrupt

(a) 2 *Dea. & Ch.* 4.

(b) Suppose the petitioner were not informed of the commissioner's reasons?

was executor, and indebted to his cestuique trusts. The petitioner was the agent of the bankrupt transacting his business, and had made out his accounts in this matter, and was therefore better able to depose as to the debt.

1839.

Ex parte
COLLINGTON.
In the matter
of
ANDERSON.

Per Curiam : — We see no grounds why the bankrupt cannot prove in the usual way; he may state the debt to be still due, and the petitioner may be the witness to prove the fact.

Common order.

Ex parte JOSEPH NORRIS. — In the matter of WILLIAM NORRIS and THOMAS NORRIS. And *ex parte* JEVONS and Company. — In the matter of WILLIAM NORRIS.

C. of R.
April 26,
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A joint fiat having issued against *William and Thomas Norris*, the latter died before adjudication: and considering the fiat *de facto* void, application was made at the office by another petitioning creditor for a new separate fiat, which had been refused.

A joint fiat issued, and one of the bankrupts died before adjudication. *Semble*, it becomes absolutely void. 2dly, another petitioner applied for a separate fiat on fresh docket papers, and on the same day the original petitioning creditor applied for a separate fiat on amended papers. Held, that the original petitioning creditor was entitled to the fiat; the joint one being rendered defective by act of God only, and through no fault

Mr. *Swanston* for the second petitioning creditors, *Jevons* and Company.

Per Curiam : — Have you served the petitioning creditor under the joint fiat?

Mr. *Swanston* : — They are not served; but they have served us with a notice of motion, and appear here by their counsel this day upon it.

of the petitioning creditor. Costs of second petitioning creditor refused. *Quære*, as to power of Lord Chancellor to render a joint fiat effective as to one bankrupt only.

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Per Curiam : — That is insufficient. They must be served with this petition, or we cannot make any order.

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It was then arranged that the two matters should come on together.

The facts were, that the joint fiat issued on the 20th April 1839; on the 22d *Thomas Norris* died; and in consequence fresh docket papers were prepared by *Joseph Norris*, and were tendered by him at the office on the 24th.

Previously on the same day *Jevons* and Company tendered docket papers. But the officer determined he could not issue a fresh fiat in favour of either party without the order of this Court.

And the petition of *Joseph Norris* prayed, that the original fiat might stand good; otherwise that he might be at liberty to issue a separate fiat.

Mr. Bacon on behalf of *Joseph Norris* : — It seems that, by the death of one of the bankrupts before adjudication, the joint fiat becomes null and void, without the necessity for a supersedeas, *ex parte Green re Maddar*. (a) But a petitioning creditor in such circumstances does not fall within the general rule of precluding the same petitioning creditor from issuing a second fiat on failure of the first. Here that failure occurred without any default of his. It was *actus Dei, qui non facit injuriam*. It is right to call the attention of the Court to the 6 G. 4. c. 16. s. 16., which provides, that in every joint commission the Chancellor may supersede as to one, not affecting its validity as to the other bankrupt; and under this section the Court may think fit to maintain the original fiat.

(a) 1 *Dea. & Ch.* 230.

Sir *George Rose* : — No order of this Court can set the original fiat right; but the circumstances seem quite sufficient to stop any other party from issuing another fiat.

Mr. *Swanston* : — Our docket papers for a separate fiat were perfectly regular, and were tendered before the others. If the joint fiat was absolutely void, as to which there can be no doubt, what is there to preclude our prior right to the fiat? As to the power of the Chancellor under that section great doubts have been entertained, *ex parte Bygrave* (a), *ex parte Wray*. (b)

Sir *John Cross* : — Without giving any opinion as to whether the joint fiat became abated by the death of *Thomas Norris*, and therefore void, it is agreed that a separate fiat is safer, and must issue, which cannot be done unless the first be superseded. The first petitioning creditor, *Joseph Norris*, is, as it were, in possession of the office, and his is the first right quoad the bankrupt; and all he requires is to be allowed to amend his papers, a difficulty having arisen in respect of them by the act of God, which seems to have deprived him of his right to proceed under the joint fiat. I am of opinion that he is entitled to issue the fiat.

Sir *George Rose* concurred, observing that the first fiat was not a bad fiat in the ordinary acceptance, and would be unobjectionable if it had not become supersedable by the act of God; and his Honor intimated

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(a) 2 G. & J. 591.

(b) *Mont. & M.* 195. In *ex parte Chapman*, in the matter of trading. And see *ex parte Watson*, 12th May 1851, an order for supersedeas as to one

bankrupt under a joint fiat was made on the ground of no trading. And see *ex parte Watson*, 3 *Mont. & Ayr.* 682.

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that it was highly improper for solicitors to attempt to snap a fiat when they well knew that the first petitioning creditors intended to proceed *bond fide*, and all the other circumstances under which the former fiat had become questionable.

Costs of Mr. *Joseph Norris* out of the estate.

Mr. *Swanston* : — We are at least entitled to costs on Mr. *Bacon's* application. There is no suggestion but that we were perfectly regular. The bankruptcy office only refused to give the fiat to Mr. *Joseph Norris*, because our papers were tendered.

Per Curiam : — We can give you no costs.

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April 22,
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Usual rule as to time to answer affidavits recently filed. A fiat taken out in order to defeat a judgment creditor, where there are no assets to be administered under it, annulled. Mere concert not sufficient.

Ex parte THOMAS and JOHN GAITSKELL.—In the matter of THOMAS BENJAMIN KING.

THIS petition prayed that the fiat which issued 20th December 1838, on the petition of the bankrupt's father, *Thomas King*, might be annulled.

It appeared that the petitioners, being creditors to the amount of 299*l.* 6*s.* 3*d.* for goods sold, in July 1838 brought an action against the bankrupt, and in Michaelmas Term obtained a verdict by default for 299*l.* 6*s.* 3*d.* and costs, which were taxed at 38*l.* 3*s.* 9*d.*, and entered up judgment. The bankrupt then carried on the business of a publican at the City Arms in King Street, Leadenhall Street, and on the 26th November he sold his lease, good will, and stock in trade for 681*l.*, but without giving notice, according to the custom of the trade, to any of his trade creditors, except Messrs. *Barclay and Co.*, the brewers, who received in respect

of a debt due to them, 628*l.* 15*s.* out of the purchase money; the bankrupt applying the surplus to his own use. The petition alleged that the sale was made with the privity of the petitioning creditor *Thomas King*, in order to defeat the judgment due to the petitioners, and with a further view to a friendly fiat to be afterwards issued. On the 13th December 1838 the bankrupt caused a declaration of insolvency to be inserted in the Gazette, with the privity of and in concert with *Thomas King*, with the same object.

The fiat issued, and, under protest and reservation of his rights to contest its validity, the petitioner, Mr. *Thomas Gaitskell*, was appointed assignee. It was afterwards ascertained that the lease had been mortgaged to *Barclay* and Co. to secure 525*l.* advanced by them; and the payment to *Barclay* and Co. was considered by the petitioners and their legal advisers to be valid and incontestable. The debts proved amounted to 614*l.*, and those unproved were estimated at 300*l.* more: the assets available to the creditors were not more than 10*l.* The petition alleged that the petitioning creditor was well aware of this state of the accounts, and that his object in taking out the fiat was not to distribute the estate for the benefit of creditors, but for the sinister purpose of defeating the petitioners' judgment; and that various offers of compromise and of composition had been made on behalf of the bankrupt and the petitioning creditor to the petitioners, which had been rejected.

The affidavits of the petitioning creditor, the respondent, in answer, denied the alleged concert, and stated that the fiat was issued *bond fide*, under the conviction that it would be the means of recovering part of the money paid to *Barclay* and Co., the deponent being advised that that payment could not be sustained beyond 450*l.* at the most. He also denied knowledge of the insolvent

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state of the bankrupt's affairs. At one of the meetings under the fiat the clerk to the solicitor for the petitioners stated, "that the petitioner intended to apply to annul the fiat, unless a liberal offer was made by the bankrupt and his friends," and subsequently the solicitor for the petitioning creditor received a letter from the petitioners' solicitor, as follows :—" Mr. *Gaitskell* presents his compliments to Mr. *Ivimey*, and will be glad to know whether it is the intention of Mr. *King* to come to any and what arrangement with his creditors." A composition of 1*s.*, and subsequently 2*s.*, in the pound was offered and rejected; but the solicitor for the petitioners refused to take less than 5*s.* in the pound and costs of the action. Other evidence was adduced of the endeavour to extort a composition.

The petition was in the paper for hearing on the preceding day, but stood over for the convenience of the petitioners' counsel. In the meantime affidavits in reply had been filed by the petitioners.

Mr. *Bethell* and Mr. *Tripp* for the respondent, the petitioning creditor, objected to their being read.

Mr. *Anderdon* for the petition.

Sir *John Cross* :— We must adhere to the usual rule, namely, to hear them read, and if they require any answer, the case must then stand over for the purpose.

Mr. *Anderdon* then opened the petition, and was stopped by

Sir *John Cross* :— Who intimated that the affidavits in support of the petition required a strong answer, to show it was not as fraudulent a fiat as was ever taken out; and called on

Mr. Bethell and Mr. Tripp :—

At the suing forth of this fiat all parties supposed it would be the most beneficial course for the body of creditors. Such was the *bond fide* view of the petitioning creditor, and so the petitioners at that time conceived it to be. They as well as the petitioning creditor at that time conceived, that something at least might be recovered from Messrs. *Barclay* and Co.; and to the present moment such is the petitioning creditor's feeling upon the subject that he is willing to undertake to bring an action to try the question. When, too, the fiat was taken out, the petitioners knew quite as well as the petitioning creditor that there was no property belonging to the bankrupt, save what might be recovered from *Barclay* and Co. There is no case of fraud made out against the petitioning creditor; the affidavits in support of the petition only charge there is "ground to suspect," but adduce no circumstances to sanction the charge, *ex parte Coles*. (a) On the contrary, although he is his father, the petitioning creditor has acted with as much hostility towards the bankrupt as any other creditor could in justice have done. At least the petitioners are not entitled to complain, after the manner in which they have tampered with us in the endeavour to drive us to a compromise.

Upon the question of motive, there is nothing uncommon or illegal in that which actuated our conduct, *ex parte Christie* (b), *ex parte Parks* (c), *ex parte Gallimore*. (d)

Mr. *Anderdon* was not required to reply.

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(a) *Buck*, 243.

(b) 2 *Dea.* & *Ch.* 505.

(c) 3 *Dea.* 51.

(d) 2 *Rose*, 214.

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Sir *John Cross* : — If there was any prospect of this fiat being worked, so as to prove beneficial to the creditors in the least degree, as I am by no means satisfied with the conduct of the petitioners, I should pause before I acquiesced in annulling it. But as it is indisputable that there is no estate, there can be no further use in its prosecution. As between the parties now before the Court, the main question is, whether the fiat was sued out by the petitioning creditor for the benefit of himself and of other creditors, or whether in concert with and for the benefit mainly of his son, to enable him to defeat the execution? This we must collect from overt acts. From thence it appears that the petitioners had brought an action, and that the bankrupt suffered judgment to go by default. The petitioning creditor's solicitor was the common agent of himself and of the bankrupt, and in that agency contrived the act of bankruptcy by inserting the declaration of insolvency. From the proceedings it appears that the bankrupt surrendered on the very day of opening the fiat, and thus defeated the right of the petitioners, which they had acquired at that moment, to take the body of the bankrupt in execution. This appears to have been the main object of the fiat, and the advantage of the creditors at large was never consulted: we must therefore supersede this fiat.

Sir *George Rose* : — I am of the same opinion. Mere concert alone is not sufficient to invalidate a fiat, but it is otherwise if the motive be only to save the bankrupt from other process of a creditor.

Fiat annulled, with costs.

Ex parte PARTRIDGE.—In the matter of KNIBB.

C. of R.
June 1,
1839.

MR. *ANDERDON* moved that the same petitioning creditor might issue a second fiat, the time for opening having expired through inadvertence, from a mistake as to the construction of the new act relating to insolvent debtors.

Second fiat issued by the same petitioning creditor.

Ordered. No expense to estate, and without prejudice to any other docket.

Ex parte STRETTELL.—In the matter of RAIKES.

C. of R.
March 20,
1839.

MR. *J. RUSSELL* moved that a trustee, the sum being 200*l.* only, and all parties consenting, should prove, and receive trust dividends.

Bankrupt trustee allowed to prove, but not to receive trust dividends.

Mr. *Pole* for the assignees.

Per Curiam.—Take an order for the bankrupt to prove; but the dividends to be paid into Court and laid out.

Ex parte JAMES.—In the matter of JAMES.

C. of R.
March 23,
1839.

THE petition stated that the petitioner left his residence at Bideford for the purpose of transacting some business in his trade as a grocer :

Quære, Whether the Court of Review can upon petition order a prisoner to be discharged ?

That whilst he was so absent, he was apprehended and taken into custody by the messenger under a fiat in bankruptcy, without any summons having been previously served on him, and he was by the said messenger conveyed in custody to Exeter :

That such proceeding was illegal; that a fiat issued against the petitioner, dated 27th of February last, under which he was declared bankrupt :

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That *Henry Mathews*, of Exeter, druggist, was the petitioning creditor, but no assignee had been appointed:

That upon being brought to Exeter on the 11th of March, the petitioner was taken into custody by the messenger before three of the commissioners, and was immediately examined by them touching his estate and effects, without having had any access to his books or papers, accounts, or any means or opportunity of preparing himself for such examination:

That the petitioner answered all the questions put to him as fully and satisfactorily as under such circumstances he was able to do; and he now craved leave to refer to the whole of his examination:

That among others the following question was put to him: "You admit you have received from creditors within the last five months goods to the amount of 1,478*l.*, and that you can only now account for 653*l.* of those goods; can you now state what has become of the rest of the property?"

That under the circumstances in which the petitioner then stood he was unable to give the amount required of him, and so stated to the commissioners:

That the said commissioners determined that the said answer was unsatisfactory to them, and thereupon committed the petitioner to Her Majesty's gaol of the borough of Bideford aforesaid, and issued their warrant for that purpose, a copy of which is as follows:—

" Devon, at the Ship Inn in Crediton,
the 11th of March 1839.

" Whereas a fiat in bankruptcy, bearing date 27th February 1839, was awarded and issued against *Frederick James* of Bideford in the county of Devon, grocer, tea dealer, and paper seller, directed to *James Wake* Esquire, *James Pearse*, *Henry Drake*, and *Thomas*

Pring, gentlemen, and is now in full force and effect: and whereas the said commissioners in the said fiat named, or the major part of them, having first respectively taken the oath required by law before they acted as commissioners, and having begun to put the said fiat into execution upon due examination of witnesses and other good people upon oath before them had and taken, did find that the said *Frederick James* before the date and suing out of the said fiat did become bankrupt within the true intent and meaning of the statutes, and did adjudge and declare the said *Frederick James* a bankrupt accordingly; and the said *Frederick James* afterwards, on the day and year and at the place above-mentioned, being present at a meeting of us whose names are hereunto subscribed, being the major part of the commissioners in the said fiat named and authorized, we proceeded to examine him touching matters relating to his trade, dealings, and estates, and the said *Frederick James* being then and there duly sworn, and required by us to make true answers to all such questions as should be put to him, we the said commissioners having, before we proceeded to act under and by virtue of the said fiat, taken the oath aforesaid, did cause the following question to be propounded to him the said *Frederick James*; that is to say, "You admit that you have received from your creditors within the last five months goods to the amount of 1,475*L*, and that you can only now account for 653*L* of those goods; can you now state what has become of the rest of the property?" To which question so put by us as aforesaid the said *Frederick James* refused to give any other than the following answer; that is to say, "I cannot." Which answer of the said *Frederick James* not being satisfactory to us the said commissioners, these are therefore to will,

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require, and authorize you immediately upon the receipt hereof to take into your custody the body of the said *Frederick James*, and him safely convey to Her Majesty's gaol of the borough of Bideford in the county of Devon, and him there to deliver to the keeper of the said gaol, who is hereby required and authorized by virtue of the fiat and statutes as aforesaid to receive the said *Frederick James* into his custody, and him safely to keep and detain without bail until such time as he shall submit to us the said commissioners, or the major part of the commissioners in the said fiat named and authorized, and full answer make, to our or their satisfaction, to the question so put to him by us as aforesaid; and for so doing this shall be your sufficient warrant. Given under our hands and seals at the Ship Inn at Crediton this 11th day of March 1839.

Signed by *James Wake*.

Henry Drake.

Thomas Pring.

"To *George Richards*, our messenger, or to *John Fidler*, his assistant, and to the keeper of Her Majesty's gaol of the borough of Bideford in the county of Devon, or to his deputy there, and to all peace officers."

That the petitioner was still in custody in the said gaol of Bideford by virtue of the said warrant, and for no other cause, and all access to the petitioner by his friends and his solicitors has been and continues to be denied.

That the petitioner was advised and submitted that the said warrant was bad and insufficient, and that the whole of the proceedings so taken against him as aforesaid, by means of which he was wrongfully appre-

hended and detained in custody, and whilst in such custody examined and committed, were illegal, and ought to be set aside:

That the petitioner was desirous and thereby submitted immediately to surrender to the said fiat.

And the petition prayed that the Court would be pleased to order and direct that the petitioner be forthwith discharged out of custody, and that the costs and expenses of the petitioner of and occasioned by his said arrest and commitment, and this application, might be paid to the petitioner by the said petitioning creditor.

Mr. *Bethell* for the petitioner:—

1st. The arrest by the messenger was illegal.

2d. The conduct of the commissioner when he appeared before them was oppressive, and caused the apparent insufficiency of the answer, as he was deprived of all access to his books and papers.

3d. The answer is sufficient.

Sir *George Rose*:— Can this be done on petition?

Mr. *Swanston* for the petitioning creditor:— I was prepared to object, and do object *in limine*, that the remedy is not by petition, but by habeas corpus.

Sir *George Rose*:—

This subject was repeatedly agitated before Lord *Eldon*, who invariably refused to order any discharge unless upon a habeas corpus. This was his Lordship's constant rule. When, indeed, the prisoner complained of the conduct of the commissioner, a petition has been previously presented, and heard with the habeas corpus;

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but upon the *habeas corpus* alone was the prisoner ever discharged. (a)

(a) Whether the Lord Chancellor could discharge on petition has again and again been agitated. From the following authorities it will probably appear that the Chancellor had this power, although in practice it has not of late been exercised. *Ex parte James*, 1719, 1 *P. Wms.* 610, cited in *Crowley's case*, 2 *Swanston*, 30, which see; *ex parte Brailsford*, 1725, *Crowley's case*, 2 *Swanston*, 31; *ex parte Mace*, 1728, *Crowley's case*, 2 *Swanston*, 58; *ex parte Lingood*, 1742, 1 *Atk.* 240, see *Crowley's case*; 1797, there seems to have been some case in this year, see 2 *Swanston*, 29; *Taylor's case*, 1803, 8 *Vesey*, 350. In this case the bankrupt was brought up on *habeas corpus*. Mr. Cooke moved that he should be discharged, observing, that a petition was not the proper course: to which the Lord Chancellor assented. To what extent this assent is to be considered as authority it does not seem necessary to inquire. The bankrupt was not brought up upon a petition; he was in court upon a writ of *habeas corpus*, and being there, it is clear that the proper course was to move for his discharge. Considering this assent as some authority, Mr. *Vesey* refers to the case of *Horne v. Lanoy*, 1 *Dick.* 170. How far

this case is any authority, the case itself will explain; it is as follows: *Horne v. Lanoy*, 15th July 1752, 1 *Dick.* 170. An infant was arrested and thrown into prison for necessities; a *habeas corpus* was granted to bring him into court to have a guardian assigned. It was attempted by petition, which was thought by Lord Hardwicke, C., improper, and therefore it was moved for. *Ex parte Tomkison*, 1804, 10 *Vesey*, 106. Whether the refusal by the Lord Chancellor to make any order was because the application was upon petition, or because the petition was without foundation, the report does not state. *Ex parte King*, 1805, 11 *Ves.* 425; *ex parte Harris*, 1811, 18 *Ves.* 237; *ex parte Oliver*, 1812, 1 *Rose*, 407; *Crowley's case*, 1818, 2 *Swanston*, 16.

In the year 1834 this subject might have been agitated in the Court of Review, but it seems not to have been noticed.

"*Ex parte Jones.*
Sept. 23, 1834.

"Mr. Jones stated, that this was a motion that the bankrupt might be discharged from custody, on the ground of the insufficiency of the warrant signed by the commissioners.

"Mr. Temple, *contra*:—This not being an application to discharge a bankrupt who has been

The order asked in the present case is, that he be

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attending to be examined, &c., the application must be by petition, supported by affidavits in the usual way.

Per Cur.—"Let the petition be answered, filed, and served, and the affidavits filed; then we will appoint an early day for its being heard.

"Motion dismissed. Costs reserved."

It is obvious in this case the question was not actually agitated.

The next case on the subject is *ex parte Jones*, Nov. 1834, 2 M. & A. 41. S. C. 4 Dea. & Ch. 536. In this case an application was made by petition to discharge the bankrupt.

"Mr. *Swanston* and Mr. *Temple*, for the assignees, objected, that the petition could not be heard, because, 1st, the warrant was not in Court; 2d, the application should be by habeas corpus, not by petition.

"1st, Although in former times the Lord Chancellor occasionally acted on petition, yet the constant practice of Lord *Eldon* was to refuse to act otherwise than on habeas corpus. In *Crowley's* case, 2 *Swanst.* 1, where all the authorities were collected, Lord *Eldon* found very few discharges on petition, and those of ancient date. His words are (page 50), 'This Court has, in several instances on petition, or-

dered the discharge of persons committed by the commissioners, sometimes ordering the commissioners to discharge them, sometimes the gaoler, passing over the commissioners.' The instances, however, are not numerous. One of the earliest is *ex parte James*, in 1719, 1 P. W. 610. In *ex parte Lingard*, 1 *Atk.* 240, on the petition of a bankrupt committed by one of the common law judges on the certificate of the commissioners of his refusal to attend their summons, Lord *Hardwicke* said, 'It is an entire new question, and quite a new case, and therefore at the first opening of it I had a great doubt whether I could properly determine the legality of the commitment, as a *habeas corpus* might have been sued out, and have been decided by the judges of the common law, which is the ready way; but I do remember a case of *John Warde*, before Lord Chancellor *King*, not unlike the present, where he determined a commitment by the commissioners of bankrupt justifiable, after he had taken some time to consider of it. A like practice occurred in *ex parte Brailsford*, 15th October 1725, and in the bankruptcy of *Thomas Mace*, in September and December 1728.' Mr. *Cullen* said, 'It was understood that your Lordship, in *Taylor's* case, had decided that

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a bankrupt under commitment for not answering could not be discharged on petition, but must obtain a writ of *habeas corpus*. That rule is consistent with Lord *Loughborough's* decision in *ex parte Noulan*. The question, however, is not material to the present case, the bankrupt being brought before the Court by writ of *habeas corpus*."

The Chief Judge said, "that as the bankrupt complained of the course pursued by the commissioners, the examination which led to his commitment might *quoad hoc* be heard; but that no order could be made on the gaoler to discharge without a *habeas corpus*. All which the Court could do upon the petition would be to intimate to the commissioners the course they ought to pursue." And in page 44 there is a note explaining, that under the old constitution of commissioners the intimation of the Chancellor was in the nature of a command, which, although they had the power, it might not be prudent for them to disobey. The note concludes thus: "Such was the state of the law before the appointment of the present Courts of Bankruptcy. But *quære* the effect at this time of such intimation, as regards London commissioners. In *ex parte Nokes*, 1 *Mont. & Ayr.* 462, the Lord Chancellor intimated that it was

a proper case for counsel to be heard on behalf of a person against whom a fiat had issued. The commissioner said, 'The Lord Chancellor intimates a wish; and when a judge merely recommends in case after case, where if he had power to order he would do so, it might lead to an inference that he has no power to make an order.'"

His Honour expressed his opinion that there were advantages attendant on a petition which did not exist on a *habeas corpus*. But *quære*, since 6 Geo. 4. c. 16. s. 39., which enacts, "Provided also, that such Court or Judge shall, if required thereto by the party committed, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of the examination of such party, whereof any such question was a part; and if it shall appear from the whole examination that the answer or answers of the party committed is or are satisfactory, such Court or Judge shall or may order the party so committed to be discharged."

In this case (*ex parte Jones*) Sir John Cross said, "In the cases cited in which the Court acted on petition, it does not appear that the warrants were not produced. Suppose the Court hears

this Court, without a writ of habeas corpus, over the gaoler? Who would advise him to obey it? (a) And if

the petition, what can be done? Can it order the commissioners to discharge the bankrupt? The Court cannot control *them* in this matter, which depends on whether the party has answered to *their* satisfaction; therefore the order must be on the gaoler, and that order can only be made under a writ of *habeas corpus*, when the gaoler would bring in the warrant. No other Court in Westminster Hall would entertain this question in the absence of the warrant. A gaoler is liable to a penalty of 500*l.* if he discharge a prisoner without a sufficient authority, and if he discharged the bankrupt otherwise than under a *habeas corpus*, he might be liable to that fine. I am therefore of opinion this Court ought not to hear this petition."

Sir George Rose said, "If, in so serious a matter as the liberty of the subject, I saw my way clearly to the power of this Court to issue a writ of *habeas corpus*, I might probably be induced to follow Lord Eldon's rule, and only entertain these questions on *habeas corpus*, but on that subject I am not free from doubts.

"When the Lord Chancellor issued that writ it was not sitting in bankruptcy, but as a common law Judge, as sitting in the common law side of the Court of

Chancery. The order, too, was drawn up by the registrar in Chancery, not by the secretary of bankrupts. Could the Master of the Rolls or the Vice-Chancellor issue a *habeas corpus*? It certainly never was done by either of those Judges. How then has this Court power to issue the writ? Not under section 2. of 1 & 2 W. 4. c. 56., which transfers all matters in bankruptcy to this Court, nor under section 4, which enables the Court to issue process to enforce obedience to its decrees — decrees in bankruptcy.

"If the Court find it necessary, it must not be supposed that it has not jurisdiction to enforce the discharge of the bankrupt by the commissioners."

The examination was so unsatisfactory that the question was never agitated, and the petition was dismissed. But the reporters say, "The Chief Judge said, his opinion was open on the question of the right to issue *habeas corpus*. Sir John Cross said, as the Lord Chancellor had the power, so had this Court."

(a) "That if any gaoler to whose custody any bankrupt or other person shall be committed as aforesaid shall suffer such bankrupt or other person to escape, every such gaoler shall forfeit five hundred pounds."

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the writ of habeas was now before the Court, how does it appear that the Court of Review has jurisdiction to issue this writ?

Mr. Bethell:—The Court is bound to interfere, as the petitioner prays that the commissioners direct the discharge, and over the commissioners the Court clearly has jurisdiction. *Crowley's Case*, 2 *Swanst.* 1; *ex parte Jones*, 4 *D. & C.* 536.

Sir George Rose:—I have every inclination to render all the assistance in my power to the prisoner; but I fear that we cannot do more than intimate, and recommend to the commissioners that the bankrupt ought to be further examined.

Mr. Bethell:—I insist, on behalf of my client, upon an absolute discharge, but with every disposition to attend to every intimation from the Court.

Sir John Cross:—The utmost which can be done by us upon petition is, not to order the gaoler to discharge, which cannot be done without the gaoler is before the Court,—but there is nothing to preclude the Court from ordering the commissioners to direct the discharge of the bankrupt, particularly when it is enacted, “that the said Judges or any three of them shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act; or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought,

by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act or may be by the said rules and regulations assigned and referred to the said Court of Review." It is said, that a commitment, like a certificate, is purely within the discretion of the commissioners; but I think there is a difference; the Court on a certificate cannot order the commissioners to be satisfied if they are not, but an order for discharge from their commitment does not involve that contradiction. I shall defer giving my final opinion at present; but there shall be no delay.

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Sir George Rose: — That we cannot discharge upon this petition appears to me to be quite clear; but if my learned colleague thinks that he can order the discharge, I will do the best in my power to give to the bankrupt the liberty of which he has been deprived; and it is some satisfaction to me to know that this cannot be attended with any practical evil, as he may *eo instanti* be again examined before the commissioners.

The order was, that the commissioners acting in the execution of the fiat do forthwith discharge the petitioner out of the custody in which he was detained, under the warrant of the commissioners bearing date the 11th March 1839; and that the costs of the petitioner and the respondent should be paid out of the estate. (a)

(a) *Quære*, would the London commissioners obey this?

C. of R.
May 24,
1839.

A petition by
one assignee to
tax a bill must
be served on the
other assignees.

Ex parte FOSBROOKE.—In the matter of FISHER.

PETITION to tax a bill before and after choice of assignees. It contained improper items, amongst which was one of 420*l.* for an abstract and ten copies.

Mr. *Swanston* and Mr. *Faber* for the petitioner:—
The bill was paid in October last.

Mr. *Bethell*, *contra*:—There are three assignees. This is by one only, and a creditor, the other assignees not concurring. In *ex parte Walker* (a) it is held that a creditor cannot petition after payment without first calling on the assignees. The other assignees must be served.

Sir *John Cross*:—Did they as assignees personally acquiesce.

Mr. *Bethell*:—Certainly; they must be served as assignees.

Mr. *Swanston*:—They have made affidavits.

Per Curiam:—Let the petition stand over for fourteen days to be amended, making the other two assignees parties petitioners; and if they decline then reanswer the petition and serve them.

(a) 1 G. & J. 95.

Ex parte JOHN BROWN and THOMAS BRUTON C. of R.
POWELL.—In the matter of JOHN BROWN and Reg. Room,
THOMAS BRUTON POWELL. Quality
Court,
Dec. 15,
1838.

THIS was a petition to supersede the fiat for want of
a sufficient debt and act of bankruptcy; the latter being
constituted under the 8th section of the 1 & 2 Vict.

Cor. Sir J. Cross.
B. and P. (the
petitioners)
carried on busi-

ness as cotton spinners, under the firm of B. and P., at the Grove Mills, and becoming embarrassed, applied to the M. and L. district banking company for an advance; and it was arranged, by a deed dated 22d August 1837, that the banking company should take the management of the concern into their hands, by means of J. their manager, under the firm of "The Grove Mills Company;" that B. and P. should conduct the business, as employees of the banking company, at a salary; that the banking company should pay all debts, and repay themselves out of the profits, and that, if they chose finally to wind up and close the concern, they should give B. and P. a full release and discharge from all debts then or to become due. Under this arrangement the affairs are carried on until the 3d October 1838, when notice is given to B. and P. that the company intend to close the concern; and at the same time J., the manager, intimates to B. and P. that "they will probably receive a notice from the company, pursuant to the 1 & 2 Vict. c. 110. s. 8., but that it would be a mere matter of form, and that they need be under no apprehension concerning it."

On the 22d October following, J., as manager, swore an affidavit of debt, pursuant to the above act, and on the 25th served the requisite notice on B. and P. The affairs having been wound up, B. and P. claimed a release, pursuant to the deed of August 1837, and on the 6th November filed a bill in chancery, praying to be declared so entitled. A negotiation for a compromise of the suit was then entered into, and a memorandum of agreement, dated 13th November, was executed, by which B. and P. were "to give up to the banking company all they had in the world, on condition that the company should release them from all their claims, and discharge their debts; and it was provided that a clause should be inserted in the deed, making void the release if B. and P. concealed or withheld any of their property." The proceedings in chancery are altogether discontinued, and the respective solicitors of the parties proceeded to prepare the last-mentioned deed and the release to B. and P., and the banking company continued to deal with the property till the 30th November 1838. On the 15th November the twenty-one days after the notice provided by the statute, expired. On the 30th November the solicitors for the banking company wrote to the solicitors of B. and P., saying, "that disclosures of improper acts by B. and P. had been made within the last three days, and that further proceedings with the proposed deeds should be stayed for the present," but still appearing to invite explanation. On the same day docket papers were prepared, and on the 1st December a docket was struck; on the 3d the fiat was issued, which was opened on the 6th.

Held, that no act of bankruptcy was committed; because, under the above circumstances, the banking company were to be considered as consenting to the default of payment beyond the twenty-one days, and that they had accepted security *pro tem.* at and prior to the 22d day, so as to satisfy the notice given under the statute. The fiat was superseded, with costs.

On petition to supersede, the usual course is, after the petitioner's counsel has opened the petition, to call on the respondent to support the fiat,—the *onus probandi* lying on him. But where the fiat issued under 1 & 2 Vict. c. 110. s. 8., and petition showed that the affidavit of debt and notice required by the act had been given, it is for the petitioner to show that the notice has been complied with, or a sufficient reason why not,—the *onus probandi* lying on the petitioner.

A petition to supersede being called on, the advertisement *pro tem.* was stayed, and hearing postponed. By leave of Court, petitioners filed "a supplemental petition," but

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c. 110. At the time of the transactions out of which this question arose, a joint stock company, called the Manchester and Liverpool District Banking Company, was established in conformity with the statute 7 Geo. 4. c. 40., and *John Stansway Jackson* was the duly authorized manager or agent of the bank. The petitioners, the intended bankrupts, were carrying on the trades of cotton spinners and manufacturers, and calico printers, under the firm of "*Brown and Powell*," at certain mills called Grove Mills, the freehold of the petitioners, and also at Spring Vale in Lancashire, also their freehold. Their business was very extensive, the returns amounting to between 2,000*l.* and 3,000*l.* per week. The petitioners kept a banking account with the banking company, which subsisted up to the execution of the deed after mentioned, the banking company making advances from time to time to them; and at the date of the deed above referred to, the petitioners had mortgaged and otherwise secured to the banking company valuable property for securing some part of their

stating facts which might have been introduced into the original. *Seem*, that it could not be used on the subsequent hearing; a motion to amend would have been more regular.

Quere, whether affidavit of debt under 1 & 2 Vict. c. 110. s. 8. need state the consideration of it?

Quere, whether an affidavit of debt under 1 & 2 Vict. c. 110. s. 8. is defective, if it depose to a debt more than creditor can establish to be due?

Quere, whether one partner can avail himself of 1 & 2 Vict. c. 96. against a copartner, without there having been a balance struck on a debt ascertained to be due from the latter?

A. and B. traded under firm of "*A. and B.*" Being indebted to *C.*, it was agreed *C.* should have the entire management of the business (*A. and B.* being retained only as *C.*'s servants), and that the business should be called "*The Grove Mills Company.*" *Quere*, whether a fiat against *A. and B.*, as carrying on business under the firm of "*The Grove Mills Company,*" no debt being due from them as of that firm, is valid?

What is a sufficient averment in a petition to let in evidence of particular facts? Sufficient to state a fact, and give in evidence the circumstances on which the conclusion of fact is founded.

A creditor assenting to an act of bankruptcy cannot avail himself of it to support a fiat.

Quere, how far a debt is suspended at law by the subsistence of a trust deed for the benefit of creditors, signed by the creditors, and still only in *feri*, so as to become incapable of sustaining a fiat?

Quere, the policy of a judge suggesting an equity to the parties, who have not themselves suggested it on the record, or called the attention of their opponents to it, so as to enable them to point their evidence to that new mode of looking at it?

account. In October 1836 the petitioners applied to the banking company for further pecuniary assistance to carry on their trade; but before granting the advance, the banking company insisted upon minutely investigating the state of the petitioners affairs; which being had, the petitioners and banking company finally agreed that the petitioners should discontinue carrying on the business in their names ("*Brown and Powell*"), and that it should go on in the name of "*The Grove Mills Company*," under the superintendence, direction, and inspection of the said *John Stanway Jackson*, as agent for the banking company; and that the banking company should pay off all the then debts and liabilities of the petitioners, and from time to time advance money requisite to carry on the business; and that the petitioners should conduct the business for the banking company, under the aforesaid superintendence, direction, and control, and should be paid an allowance out of the same in respect of their labours and attendance. In February 1837 it was proposed by the company, that the petitioners should execute the deed of inspectorship, before referred to and after mentioned, which the petitioners then declined. Under the above arrangement the affairs were carried on for some time; and various payments were made by *Jackson*, through means of checks drawn by *Jackson* in the name of "*The Grove Mills Company*" upon the banking company, but which were not paid to the party in whose favour they were expressed, but were first cashed at the bank by a clerk of the banking company. *Jackson* had an office appropriated to him by the petitioners at their mills, and all pecuniary matters were transacted by him, and a large amount of the debts and liabilities of the petitioners were paid off. Notwithstanding the petitioners refusal to execute it as above stated, on the

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11th February 1837 the banking company caused a deed of inspectorship to be prepared, and tendered it to the petitioners for execution, which they still refused, and considerable negotiation took place on the subject. At length the petitioners agreed to execute the deed, provided a proper provision was introduced for securing to them a general and absolute release from all their debts and liabilities upon the concern being wound up by the company, whereupon the following memorandum was drawn up:—

“ Manchester and Liverpool District Banking Company and Messrs. *Brown and Powell*.

“ Mem.—That on the bank consenting to vary the terms of the deed already prepared, by securing to *Brown and Powell* a general release upon the bank taking possession of the plant and property described in the deed, the parties, *Brown and Powell*, shall execute the same as soon as the same shall be ingrossed with that alteration; the understanding of the parties being, that if the bank shall exercise the power vested in them by the said deed of winding up the concern, then Messrs. *Brown and Powell* shall be entitled to a release. All the other clauses in the deed to stand as drawn. Dated at Liverpool, 12th August. *L. and E. N. Alexander*, solicitors to Messrs. *Brown and Powell*.

“ *J. S. J.*”

The terms contained in the above memorandum were agreed to by the banking company, and by *Jackson* signing his initials; and the deed which had been prepared and tendered to the petitioners for execution was altered in conformity therewith, and, with such alteration, was ingrossed and executed on the 22d August 1837, on which day it was signed; and it purported to be made between the petitioners of the first part *Sir Salisbury Pryce Humphreys and James*

Newton, trustees for the banking company, of the second part; and *Jackson*, therein described as the "general manager of the bank, and the inspector nominated on behalf of the said company for the purposes therein-after mentioned," of the third part. The deed recited, that, "with a view to the security of the banking company, as well in respect of the balance due and owing from the petitioners, and such liabilities and engagements as therein mentioned, as also in respect of all and every sums and sum of money which should or might thereafter become due to the banking company by reason of or on account of any future advances, &c. which the banking company might make to or for the use, &c. of the petitioners or otherwise, on their joint account, the board had required that until the aforesaid balance, and all interest to become due in respect thereof, then remaining due and owing to the banking company, and also all and every other sums or sum of money that should hereafter become due and owing for any such future advances, &c. as aforesaid, and all discount and interest, commission, and other usual banking charges to become due in respect thereof, should be fully paid, reimbursed, and satisfied to the company, or until the general board of directors should otherwise determine, as therein-after mentioned, that the business and affairs should be carried on and conducted, or finally wound up and settled, under the inspection and control of *Jackson*, subject and in the manner therein-after mentioned, either in the names of the petitioners, and under their firm of *Brown and Powell*, or under any other firm or name, and with such powers and under such provisions and stipulations as were therein-after contained; with which requisitions the petitioners had agreed to comply. And the deed

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further recited, that for effectuating the objects and purposes aforesaid, the petitioners, at the request of the banking company, had agreed with the trustees, and *Jackson* as such inspector on behalf of the banking company, to execute those premises; and it witnessed that the petitioners covenanted, &c. with the trustees, and as a separate covenant with *Jackson*, jointly and separately, that they would forthwith cause to be made out a true account of their partnership, or all other stock, goods, credits, property, or effects, of as well real as personal, and of the true value thereof, and of the several debts, &c. affecting the same, and to which the petitioners or either of them, in respect of the said co-partnership or otherwise, were or was liable, in order that *Jackson* might thereby be enabled to ascertain the full and just value thereof, and what, in the discretion of the banking company, would be the proper mode of conducting or carrying on or of winding up and settling the business, and should deliver such account, after being signed by them, to *Jackson*; and further, that so long as any money should be due to the banking company, not otherwise secured to the satisfaction of the company, by the petitioners or their estate, upon their account current with the banking company, or by reason of any past or future advance, &c. which the said company might make to the petitioners, the petitioners would wholly or entirely employ themselves in the best manner they could, either in order to carry on and continue the business, or to wind up and finally settle the same, and the affairs of the said co-partnership, as the banking company should at their absolute discretion determine, and should perform from time to time all the directions of *Jackson*; which orders he was thereby authorized from time to

time, subject to the control of the general board, to make, touching the managing, &c. of all the capital stock, &c. of the firm, and touching the various other matters therein expressed, and touching all other matters and things relating to the estate, and the management and direction, and the winding up and settling, of all the said affairs and business, or concerning such several matters as aforesaid. And the deed contained a proviso, that the petitioners, when required by the inspector, or when deemed by him necessary, should permit and duly authorize and empower him, in the names of the petitioners, to ask, demand, &c., sue for, recover, and receive, all debts due to the firm, but in trust for and on account of the estate; and also a proviso, that the petitioners should, when required by the banking company, cease from managing or taking any part, as the said general board should direct, and, if so by them required, leave the concern and premises entirely, and not afterwards interfere therewith in any way, until again required so to do by the board, and otherwise as therein expressed; and also should, when required by the board, give up the entire management, control, and winding up and disposition of the business to the inspector, and give him and the board all further powers to do any further act or deed whatsoever for effectually carrying on, conducting, or winding up and disposing of the business as might be considered necessary. And it was further agreed, that during the inspectorship all the monies, &c. which should be received by the petitioners and the inspector, on the inspectorship account, should be paid to the company on account of the estate. And the deed also provided, that all debts contracted, and all contracts entered into, by the petitioners, at the request, &c. of

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the inspector, should be paid and performed by the inspector as though he had himself incurred such debt or made such contract in pursuance of the indenture; and the petitioners were thereby indemnified therefrom in every other respect. And it was provided, that the indentures should not be construed to restrain the company from, at any time thereafter, commencing any suit or other proceeding, at law or equity, for compelling payment for any sum then due or to become due to the company from the petitioners or their estate, or from at any time exercising the powers given them by the then present or any future mortgage, security, or lien for any sum due or to become due as aforesaid, unless the board, pursuant to the proviso next contained, determined that the business should cease, and the affairs be finally wound up, in which case the petitioners, their heirs, &c., should be wholly discharged from all liability in respect of the debt which might be then due to the company; also, that the board might, at their free will, declare that the business should be no longer carried on under the deed, and cause such notice as therein mentioned to be left at the counting house of the said business, and immediately after the expiration of the notice the deed should in future be void to all intents and purposes. The deed provided a certain allowance to the petitioners for their attention to the said concern, and that during the operation of the deed they should be permitted to occupy the dwelling house and premises then occupied by them, and should have the personal use of the furniture, plate, &c. therein mentioned as forming part of the effects available for the purposes of the deed, not diminishing the same, but keeping it in proper order and repair.

The petition then went on to state that the busi-

ness was continued to be carried on by *Jackson* as their agent, it being fully understood that the banking company should so continue to deal with it as long as they choose, and that when that ceased the petitioners should be entitled to a release from all debts and liabilities. On the 3d October 1838 the company resolved that the business should be no longer carried on, but should be finally wound up and settled according to the provisions of the deed and the aforesaid arrangement, of which the petitioners received intimation at a board meeting of the company, to which they were admitted on that day. Some delay arose, owing to the evil consequences of putting an end to so large a concern, and throwing so many hands out of employ, *in the course of which Jackson intimated that the petitioners might receive a notice (the notice under the statute after mentioned), but assured them that it would be a mere matter of form, and they need be under no apprehension concerning it.* On the 22d October, *Jackson* swore an affidavit of debt, according to the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., as follows:—

“*John Stansway Jackson* of Manchester, &c. banker, maketh oath and saith, that he is one of the public officers for the time being of a certain co-partnership called, &c., carrying on the business of bankers in England, pursuant to the statute in that case made, &c. duly nominated according to the said statute for and on behalf of the said co-partnership. And the deponent further saith, that (the petitioners) of, &c., cotton manufacturers, &c., and carrying on trade in co-partnership under the style or firm of “*The Grove Mills Company,*” are indebted unto the said banking company in the sum of 50,000*l.* and upwards, and that such debt is justly due from the said (petitioners) to the said bank-

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ing company, and that the said (petitioners) are traders within the meaning of the laws now in force respecting bankrupts.

"J. S. Jackson.

"Sworn at Manchester aforesaid, on Monday the 22d day of October 1838, before me,

"J. K. Winterbottom,

a Master Extraordinary in Chancery."

On the 25th the petitioners received the notice required by that statute. The petitioners contended that there was in equity no debt due by them to the company, but that they were entitled to a general release, and that the proceedings in contemplation of bankruptcy were taken in breach of good faith; that the debt claimed was for the most part incurred during the management of the company, and the company had already security on the property of the petitioners to a very large amount.

On the 8th November last, prior to the issuing of the fiat, the petitioners filed a bill in Chancery against the company, praying that they might be declared entitled to such general release as aforesaid, and to the benefit of the deed, and other arrangements; whereupon a negotiation for a compromise was entered into, and it was agreed, on behalf of the company, that they should execute to the petitioners such release as was claimed by them, and that the banking company should pay the outstanding debts and liabilities of the concern. The company continued, up to the time of the docket after mentioned, and subsequent thereto, to pay and discharge the claims upon and in respect of the said concern. The petition also stated the petitioners likewise were shareholders in the company, and therefore the company could not have any legal debt against them. Notwithstanding, on the 1st December 1838 a docket was struck

against the petitioners, on the petition of *Jackson* as agent for and on behalf of the company, and the fiat was bespoken for the 3d December, and was about to be opened. The affidavit of debt stated the amount to be due from the petitioners under the firm of "The Grove Mills Company," such being in fact the name under which the business was carried on by the banking company. The petition questioned the sufficiency of the affidavit of debt, and the act of bankruptcy founded thereon, and notice of the affidavit constituting the act of bankruptcy. By order of the court, the advertisement of adjudication had been stayed for a week, and the petition prayed a supersedeas.

The petitioners also filed a *supplemental petition*, with affidavits in support of it; and it will be seen that considerable discussion arose, during the argument, as to the right of using this supplemental matter. The facts disclosed by the supplemental petition were as follow:—*Mr. Alexander*, one of the solicitors of the petitioners, in pursuance of a letter, dated the 11th November 1838, to *Jackson*, announcing his intention to do so, on the 13th November attended the meeting of the directors of the banking company, and being shown into a private room, was there met by *Jackson*, and *Mr. Winterbottom* the solicitor of the company, and several of the directors, and stated the proposals he had to make on behalf of the petitioners, which the director who acted as chairman put down in writing, and stated he would lay them before the board, which was then sitting up-stairs. Presently afterwards, *Mr. Winterbottom* returned and produced another paper, which he said the directors had approved of. This *Mr. Alexander* perused, and approved on behalf of the petitioners; and the same, with a duplicate, was subsequently signed by *Mr. Alexander* and *Mr. Winterbottom*, as the respective solicitors and agents

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of the parties, as an agreement between the petitioners and the banking company, and was as follows :

" 13th November 1838.

" *Re Brown and Powell* and the Manchester and Liverpool District Bank.

" Mr. *Alexander* proposes that Messrs. *Brown* and *Powell* shall convey and assign all they have in the world, in possession, remainder, expectancy, or otherwise, on condition that the bank release them from all their claims upon them, and discharge their private debts; that a clause be inserted making void the release if *Brown* or *Powell* conceal or withhold any property whatsoever; that *Brown* and *Powell* shall aid in investigating the accounts, for which reasonable time is to be allowed; that the bank may either pay the debts in full, or divide the property *pro rata* among all the creditors; that an assignment, containing all stipulations effectually to carry out this proposition, shall be forthwith prepared; that *Brown* and *Powell* shall remain at their present salaries, for any time not exceeding six months, as the servants of the bank, but liable to leave at any week's end.

" *L. Alexander.*

" *J. K. Winterbottom.*"

Each solicitor retained one part of this agreement. On the 17th November Mr. *Alexander* received from Mr. *Winterbottom* a draft of the proposed deed of assignment so agreed on for perusal, and on the 19th November a letter dated the 18th, as follows :

" Stockport, 18th November 1838.

" Dear Sir,

" I shall be obliged to you to go through Messrs. *Brown* and *Powell's* draft as soon as you can. Do you think it would save trouble if you came over here to finish it? It is quite necessary to have it arranged as

soon as possible. I suppose the title startled you, as being a composition deed of that nature; but I see no other way of carrying out the undertaking of the parties. Of course they will have to receive in some way or other the releases agreed upon; but you are well aware that in such a form or of similar import only can the bank agree. Their deeds enable them to make any arrangements as creditors, but none as purchasers. Besides, an *ad valorem* stamp would be 1,000*l*.

"Yours truly,

"J. K. Winterbottom."

"Messrs. *Alexander* and Son,
Solicitors, Halifax."

On the 22d November *E. N. Alexander*, another of the firm of the petitioners solicitors, attended on Mr. *Winterbottom* in order to settle the draft conveyance, and consider the release and indemnity to be given by the banking company; and *E. N. Alexander* pointed out an objection to the draft as drawn by Mr. *Winterbottom*, in consequence of its being a conveyance and assignment for the benefit of creditors, when it ought to have been an absolute conveyance to the banking company, they being bound, by the agreement of the 13th November, to pay all creditors of the Grove Mills Company and of the petitioners, and to indemnify them therefrom, and release them from any demands by the bank. Mr. *Winterbottom* admitted the objection to be good, according to the agreement of the 13th November, but stated that he had so prepared it only because the company could not, in accordance with the principles of their establishment, take an absolute conveyance to themselves, and because it would save a very large *ad valorem* stamp duty. After various suggestions, Mr. *E. N. Alexander* and Mr. *Winterbottom* having mutually agreed on the principles of the agreement, the latter requested the

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former to alter the draft deed accordingly, which he did, and twice attended in the course of the 22d November with the draft so altered, in order finally to settle the same with Mr. *Winterbottom*, who being absent, a clerk of his, Mr. *Reddish* (who stated he knew the business thoroughly, and was fully instructed to do so), received the altered draft, and Mr. *E. N. Alexander* promised to call again in the course of the same afternoon to have Mr. *Winterbottom's* approval. He and the petitioner *Brown* did call, and then found that Mr. *Winterbottom* had gone to Manchester; but Mr. *Reddish* stated the draft had been perused and was correct, and might be considered as approved on behalf of the company, and that Mr. *Winterbottom* wished Mr. *E. N. Alexander* to prepare the draft of the release and indemnity from the bank to the petitioners, which the latter promised to send to the former by the 24th November, which he did, accompanying it with a letter, as follows:

“ Dear Sir,

“ Having understood from Mr. *Reddish* that you preferred our preparing the proposed release and indemnity from the Bank to Messrs. *Brown* and *Powell*, we promised to draw and forward to you by this night's mail, for perusal, the draft prepared by the express understanding, as stated by Mr. *Reddish*, after examination of our attestation of the draft, assignment, and release, that such alterations were satisfactory and would be in accordance with your clients views. The *Reddish* estate and its liabilities may for the present be considered as not embraced in the operation of either the deed of assignment and conveyance, or of the release and indemnity, but may be the subject of mutual arrangement and settlement (on the basis referred to in the conversation between yourself and Mr. *Edward Nelson Alexander*) when all parties meet to settle the

business, or in the interim, if you prefer it. We have taken for granted, that, according to the constitution of the banking establishment and the terms of the said deed already executed, the trustees and public officers, as described in the release and indemnity, are the proper parties to enter into such deed; but of course the introduction of them as parties is contingent on their rights, &c., and will be subject to correction by yourself, though we should wish to be satisfied that the releasers and covenanters are now sent perused and approved, and also the copy of the conveyance and assignment as altered, at your earliest convenience; and in the interval remain,

Dear Sir, &c. &c.

"*E. N. Alexander.*"

Not receiving any communication in the meantime, on the 29th November Mr. *E. N. Alexander* wrote to *Winterbottom*, urging the completion of the deed, and in answer received the following letter, dated 30th November 1838, addressed Messrs. *Lewis and Edward Nelson Alexander*, Solicitors, Halifax, which was in the words and figures or to the purport and effect following; that is to say,

"Stockport, 30th November 1838.

"Dear Sirs,

"*Brown and Powell*.—In reply to your letter of yesterday's date, I beg to apprise you that within the three last days disclosures have taken place as to improper acts of these parties, both before and since the memorandum of arrangements was entered into between Mr. *Alexander* and me, which have induced the committee of directors to order that all further proceedings with the proposed deeds shall for the present be stayed. We shall be at home any time from Monday next, if it

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should be deemed necessary for you to come over in consequence of this communication.

" I am, dear Sirs,

" Your obedient servant,

" *J. K. Winterbottom.*"

" Messrs. *L. and E. N. Alexander,*
 Halifax."

The petitioners denied any breach of the arrangements previously entered, and stated their readiness to fulfil the same, and proceeded to show that, relying on the completion of the arrangements entered into, and supposing further proceedings in the suit mentioned in the former petition to be unnecessary, and pending the currency of the twenty-one days from the service of the notice of the 24th October, instructions were forwarded to the solicitors agent in London, Mr. *Emmett*, that the suit in Chancery was settled, and in consequence no further proceedings were taken to obtain the injunction, The solicitors of the bank had also given similar intimation to their agents in town to discontinue proceedings. Prior to and up to the issuing of the fiat, *Jackson*, as agent for and on behalf of the bank, continued in possession of the Grove Mills warehouse in Manchester, and of the property therein, amounting to 15,000*l.* or 20,000*l.* value, and also in possession of the mills and property therein. On the 16th November, according to the request of the banking company, the keys of the warehouse were delivered up to them, and on the 28th November the same was finally closed by the company, and all business ceased. Up to the 1st December *Jackson*, on behalf of the company, had made payments to the greater part of the Grove Mills Company creditors, and the banking company had in other ways dealt with the property as their own since the agree-

ment of the 13th November. Amongst other things, on the 28th November *Jackson* caused circulars to be issued, recognizing the arrangements entered into, and desiring the debtors to the property not to pay the amounts to the petitioners, but to withhold them altogether till further notice.

The fiat, notwithstanding all these circumstances, was opened on the 6th December instant, the twenty-one days notice having expired on the 15th November.

Mr. Swanston and Mr. Rogers for the petitioners.

Mr. O. Auderdon and Mr. Bacon for the respondents, the banking company:—Affidavits have been filed by the petitioners only this morning; we have not seen them, and still less had time to answer them. If they are read, we must have an opportunity of meeting them.

Sir John Cross:—It is premature to say any thing on the subject at present. We shall see if they require any answer.

Mr. Swanston and Mr. Rogers:—We do not dispute the trading; but we dispute altogether the petitioning creditor's debt. We deny there is any evidence of a legal debt. Moreover, the individuals, against whom the fiat has issued were shareholders in the bank, who are the petitioning creditors; nor is there any pretence for the suggestion, that the petitioning creditors have brought themselves within the operation of the recent statute. There is no evidence of any debt whatever. We further say, that the proceedings taken under the statute are irregular, the affidavit which has been filed being defective in the most essential points. By the transactions between the bank and the petitioners, the latter

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were entitled to an absolute release from the bank on the terms of giving the mortgage. Then again we say, the act of bankruptcy being alleged to consist in a noncompliance with the requisites of the statute, none has been committed, because the proceedings under that statute have been irregular, and because at that time we were induced not to take steps which we might have taken against them, to compel performance of the agreement for a release.

On a petition to supersede, the usual course is, after the petitioner's counsel has opened the petition, to call on the respondent to support the fiat, the *onus probandi* lying on him; but where the fiat issued under the 1 & 2 Viet. c. 110. s. 8., and the petition showed that the affidavit of debt and notice required by the act had been given, it is for the petitioner to show that the notice has been complied with, or a sufficient reason why not, the *onus probandi* lying on the petitioner.

Sir *John Cross* :—Is there any objection to our taking the usual course? I have read the petition, and we usually call on the petitioning creditor to support the fiat, as the affirmative lies on him.

Mr. *Swanston* and Mr. *Rogers* :—That would be proper with regard to the legal requisites. With respect to the topic on which there is so much evidence, the right to a release, this is a legal and equitable question, and perhaps it lies on us to show we are entitled to a release.

Mr. *Anderdon* and Mr. *Bacon* :—All we have to do is to prove a debt. There are no objections to the act of bankruptcy that have not been disposed of by the case of *ex parte Hall*. (a) [Sir *John Cross* :—It will be for you to adduce the affidavits, and the Court to determine the question of the validity of the act of bankruptcy.] We prove the act of bankruptcy through the medium of the affidavit, which they state on the face of the petition as being an objection to our fiat :—an act of bankruptcy which is not impeached; and proving the

(a) We were not able to avail ourselves of the shorthand writer's notes of that case in time for this number, but it will be reported fully in the next.—*B. M.—E. C.*

petitioning creditor's debt, the case follows as of course. We must look how the averment in the petition is, to see what they put in issue. [Mr. *Swanston* : — There is a supplemental petition filed by leave of the Court. Application was made at the last sitting, and no objection taken. It is answered for to-day.] It is quite irregular. We could not tell what the petitioner was going to do with the supplemental petition. The Court said there was no permission requisite to file a supplemental petition if it was regular, and that the petitioner must stand or fall by it. [Sir *John Cross* : — It does not pray any thing supplemental, it only adduces some supplemental facts.] Not one supplemental fact. It supplies the defect of the original petition. The proper and only course which can authorize the Court to proceed is by amending the original petition on grounds to be made good to the Court on the permission being asked. Suppose they had applied to amend, we should have known what they wished to introduce, and have been prepared to meet them now. But what they have done is to file a supplemental petition on a whole mass of facts, which, had they stated originally, we should have been in a condition to have met on the former day. At their instance the advertisement has been stayed, and for the present purpose the advertisement must go if they cannot sustain their case on the original petition. If they file their supplemental petition regularly, and have affidavits in support of it, well; but not having such affidavits they cannot be heard on the supplemental petition. (a) [Sir *John Cross* : — I do not see at present that the supplemental petition is material, unless the evidence should be inapplicable to the original petition.]

(a) The affidavits intended to be used in support of the supplemental petition were filed previously in support of the original petition.

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A petition praying a supersedeas being called on, the advertisement *pro tem.* was stayed, and the hearing stood over. The petitioners then, by leave of the Court, filed "a supplemental petition," but stating facts which might have been introduced into the original. *Semble*, that it cannot be made use of on the subsequent hearing; a motion to amend would have been the more proper course.

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They impeach the requisites of this fiat, on the ground of misdescription of the parties. With regard to the debt, there is one which their petition shows quite independent of the inspectorship,—existing anterior to it. All they say is, there is no sufficient debt disclosed by the affidavit. The act of bankruptcy is on the petition itself, viz. that the affidavit was filed, and notice served; therefore, all the requisites are admitted on the face of the petition. [Mr. *Swanston* :— It is only stated that “it is alleged” that such and such things took place. Then we point out the defect in the affidavit; we say it does not allege any consideration for the debt.]

Sir *John Cross* :— Is this any thing more than a technical objection, which by delay they might have an opportunity of setting right? You had better go to the act of bankruptcy; and perhaps the respondents return the burden of proof on the other side, in this way,—that if the petitioners admit in the outset that that affidavit was filed, then it is for them to show a performance or a reason why they did not perform the request made to them to pay the debt within the time limited. Then the act of bankruptcy, if committed at all, was committed on the 16th November; and the question is, whether between the time the affidavit was filed, and notice of it served, things passed between the parties which rendered it not an act of bankruptcy.

Mr. *Swanston* and Mr. *Rogers* :—

Quere, whether
 an affidavit of
 debt under
 1 & 2 Vict.
 c. 110. s. 8,
 need state the
 consideration.

In the first place, we say that the affidavit of debt is not such as the statute requires, because it does not state the consideration. The only affidavit which is alleged to have been filed is that by Mr. *Jackson*, who states “that he is one of the public officers of a certain copartnership, called the Manchester and Liverpool District

Banking Company, carrying on business, &c.; and that *Brown and Powell*, cotton manufacturers, &c., and carrying on trade in copartnership under the style or firm of the Grove Mills Company, are indebted unto the said banking company in the sum of 50,000*l*. and upwards, and that such debt is justly due from the said *Brown and Powell*, who are traders." No consideration is stated. This proceeding under the statute is undoubtedly of a very efficacious nature, and is calculated to have a very important operation on the interests of individuals against whom it is directed; and the statute expressly requires that the creditors "shall file an affidavit or affidavits in her Majesty's courts of bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits." Now when the statute speaks of a debt, it must be interpreted, as all other statutes have been when using that term, as speaking of something that has all the legal requisites that can constitute a debt, and of course, consideration. Accordingly, under the old practice, the petitioning creditor being required to make affidavit of his debt, that affidavit always specified a consideration; "that the bankrupt was indebted in 1,000*l*." and so on, and *for what*. The affidavit to hold to bail always states the consideration. [Sir John Cross:—There is this difference: In the act of parliament which requires an affidavit to hold to bail, the act requires the cause of action should be stated. This statute requires only the debt to be stated.] That is very true. The consideration is necessary to a cause of action; so it is for a debt. The statute means a debt which amounts to a cause of action. A debt which would not be a foundation for an action is not such a debt as

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the statute contemplated; it must have been understood to be a debt having all the requisites which are essential in order to found proceedings at law. The 13th sec. of the 6 G. 4. c. 16., by which the old act was superseded, is this, "that the petitioning creditor shall, before any commission be granted, make an affidavit in writing of the truth of such his or their respective debt or debts;" and it was in accordance always thought requisite to state the consideration. Not only would it seem to be essential to be a compliance with the statute as a debt, but there is no debt unless the constituents of a debt be set out, namely, consideration. To call a sum of money a debt does not make it such; you must establish it to be a debt by showing the consideration. It may be morally and justly due,—the parties may have entered into a transaction which may be, in *foro conscientie*, constitutes something due; but that will not enable them to issue a fiat. What they must show is, that there is what the law of England recognizes as a debt on which an action could be maintained. And they could not recover on this affidavit. It is extremely material, as a check to any abuse, that the party should set out the consideration.

Quære, whether an affidavit of debt under the statute 1 & 2 Vict. c. 110. s. 8. is defective if it depose to a debt greater than the creditor can establish to be due.

Again, the affidavit states that the petitioners are indebted in "50,000*l.* and upwards." In order to make out an act of bankruptcy by noncompliance with the provisions of the act, the creditor must show there was a debt, and a debt to the amount specified. They must here be prepared to satisfy the Court there is a debt to the amount of 50,000*l.* As to this there is no evidence; nothing but conjecture. This is not like the ordinary mode of swearing that 100*l.* and upwards is due, so as to constitute a good petitioning creditor's debt; for here the debtor, to prevent bankruptcy, must either pay the debt stated in the affidavit, or find security for its amount to the satisfaction of the creditor, or give bond,

with sufficient sureties, to pay what sum may be recovered in an action. The exigencies of the case—giving security or bond — will vary with the amount sworn to. And what can be a more glaring abuse of this process than for a creditor whose debt amounts to 100*l.* to swear to a debt of 50,000*l.*, putting it out of the debtor's power to avoid bankruptcy, either by payment, compromise, or finding sureties? Sureties for the real debt might be found, but not for so large amount as 50,000*l.* As then there is no evidence to support the debt of 50,000*l.*, there is no act of bankruptcy, and the argument reverts to this: that the statute having enabled a creditor, who must specify the amount of his debt, to call on the debtor for sureties for that debt, and having declared that the debtor shall become bankrupt unless he find sureties to that amount, the statute must be understood to speak of a creditor to whom that debt is justly due; it must speak of a creditor who, when his fiat is challenged, proves, to the satisfaction of the tribunal before whom its validity is questioned, that that debt was due. If it was not due there is no act of bankruptcy, because the act of bankruptcy which is committed here is by not finding sureties at the demand of a creditor whose debt amounts to 50,000*l.*, which the respondents cannot establish themselves to be.

We must then call the attention of the Court to the fact that the petitioners were large shareholders, holding fifty shares each in the bank. There is no legal competency in the bank to sue. No action can be brought by one of a firm against the other; for a man would be suing himself. And, in the next place, if there were a legal competency, there would, on certain terms, be a right to an injunction in equity. The fourth section of the 1 & 2 Vict. c. 96. would cure that difficulty, provided the creditors could show there is an ascertained

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Quere, whether one partner can avail himself of the statute 1 & 2 Vict. c. 96. against his copartner, without there having been a balance struck, and a debt ascertained to be due from the latter.

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debt on which these petitioners could be sued at law, which is not the case. In *ex parte Hall* the case rested on that admission. [Mr. *Anderdon*:—We shall cure that difficulty by an affidavit filed this morning, and rely on a debt due to us before the inspectorship came into operation.] We shall object to its being used. It is admitted, then, the objection is good, unless it is covered by an affidavit not seen by us, which we are sure the Court will not sanction.

A. and B. carried on trade under the firm of "A. & B." Being indebted to C., it was agreed C. should have the entire management of the business (A. and B. being retained only as C.'s servants), and that the business should be carried on under the firm of "The Grove Mills Company."
Quære, whether a fiat issuing against A. and B. as carrying on business under the firm of "The Grove Mills Company," no debt being due from them as of that firm, is valid.

Another objection to this fiat is, that it issues against the petitioners, described as carrying on business under the firm of "The Grove Mills Company;" and it is now disclosed to us that the creditors rely on a debt due from us before that firm came into existence.

But the main objection to this fiat is, that it has been fraudulently issued, or rather, against good faith. At the outset we are told that the notice was merely formal, and that we need not attend to it, and then our non-attention to its exigency is converted into an act of bankruptcy.

Sir *J. Cross*:—If you show them consenting parties to the non-compliance with the demand, is not that a most material point? Go to that point at once. Here is a demand made on you for 50,000*l.* in a certain form, and if you do not comply with it within twenty-one days you are a bankrupt on the twenty-second day. Now can you show that during the twenty-one days either the demand was waived, or that they were consenting parties to the delay?

Mr. *Swanston* and Mr. *Rogers*:—

That we can do without a doubt. On the 24th October the notice is given, and the twenty-one days would expire on the 15th November. In the mean-

time it is not disputed that on the 13th November there was an agreement concluded between the parties wholly invalidating the notice; an agreement under which the petitioners were to give up to the bank all their property, and the bank were to give releases. Things go on towards completion of the arrangement (*See the supplemental petition*), and the only obstacle is that contained in the letter of the 27th, which says, "within the three days disclosures have taken place, the result of which is, the bank order all further proceedings with the proposed deeds shall be stayed for the present;" not absolutely stayed, but stayed "for the present;" and then the letter still goes on to invite further communication, in the words, "I shall be accessible on Monday if you wish to see me on the matter."

But there was a conclusive agreement on the 13th. How can that be rescinded? [Sir John Cross:—Without going back to the date, if it is convenient to you, confine your attention at present to the single question, Whether, on the 16th day of November, an act of bankruptcy had been committed? It is not at all material what happened after that day, if there was an act of bankruptcy then, except to show the nature of the communication that was taking place between the parties.] There was under the deed an engagement that the business should be carried on under the inspection of the bank. That deed contained an express clause that the petitioner should be indemnified against all debts contracted and all contracts entered into. When the deed was proposed the petitioners required that in a certain event the bank should enter into an obligation to give a release. The scheme of arrangement may be stated in a word. The bank make an allowance to the petitioners; it was agreed they should conduct the business. In fact the bankers were the

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traders, and carried it on to all intents and purposes, and Messrs. Brown and Company remained there at a salary as their agents, subject to be dismissed. It was to be carried on by the bank as long as the debt was due to them; if the debt due had been paid off, then there was an end to the inspectorship. The bank might wind up the business if they thought fit. Then *Brown* and *Powell* say, "You may take all our property, and you must release us from our debt." That was matter of dispute, and it delayed the execution of the deed for some months, until July, when a memorandum was settled to that effect; then a clause was introduced into the deed. The deed was executed in August 1837. The deed so executed contained this clause: "If the bank thought fit to wind up the concern, they were to give *Brown* and *Powell* a release."

Now we say on the 3d of October there was a meeting of directors of the bank, to which Mr. *Brown* was invited, and which Mr. *Alexander* his solicitor was invited to attend. The chairman and some other directors came out of the board room to them, and announced to Mr. *Brown* that the directors had arrived at the resolution that this business should be wound up. [Sir *John Cross*: — You are proceeding now to argue you were entitled to a general release. Allow me at present to confine your attention to what passed between the parties from the 24th of October, when the affidavit was filed, to the 16th of November.] What passed was this: we insisted there had been this resolution on the 3d of October. Our discussion begins with a letter of the 5th of October. The resolution of the 3d of October was founded on the result of inquiry which had been begun in August into the state of the concern, as to whether it was profitable; and being found unprofitable, on the 3d of October this resolution passed.

On the 5th of October, two days after this, Mr. *Alexander* writes this letter to the solicitor of the bank :

" We find some measure must be adopted to bring this account to a close with your clients, the bank, and we therefore hasten to request that you will let us have a copy of each of the deeds of mortgage, &c. which our clients have executed to yours, and we can then, and only then, advise our clients with any advantage. Of course we will be responsible for any expense of such copies; and if, when you transmit them, you will name the day on which you will be attending a general meeting of the board, our senior partner would contrive to meet you if possible."

On the 22d of October this affidavit of debt seems to have been sworn. It was presumed, from the statement of Mr. *Jackson*, it was a mere matter of form, and the petitioners need not pay any regard to it. It is true Mr. *Jackson* goes on to say it had reference to a bankruptcy, "*if need be*;" but that statement is positively denied. On the 6th of November a bill was filed by the petitioners against the bank, requiring them to carry into effect their agreement by which they were bound to execute a general release to the petitioners.

The affidavit of Mr. *Lewis Alexander* will state the case shortly as to that point.

Mr. *Anderdon*:—This introduces the point with respect to the supplemental petition; you are about to read evidence now which refers exclusively to the matter stated in the supplemental petition. The objection is, it is matter which is not in the original petition, and it cannot be read, even supposing that supplemental petition is properly before the Court, which I contend it is not; it would be reading in support of it an affidavit filed before that petition was answered. The rule is, no affi-

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What is sufficient averment in a petition to let in evidence of particular facts: It is sufficient to state a fact, and give in evidence the circumstances on which the conclusion of fact is founded.

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davit can be read in support of a petition which is sworn before the petition was answered.

Sir *John Cross*:—Until it is read I cannot tell whether it is material in support of the original petition. I must first have it read to know whether it is relevant.

Mr. *Anderdon*:—Your honour will take a note of the objection.

(An affidavit was then read of the facts, as detailed in the supplemental petition, which occurred on the 13th November, when the agreement of that date was entered into.)

Sir *J. Cross*:—The first question is, Whether or not that agreement was a security to the satisfaction of the creditor at that time,—complying with the exigency of the statute?

Mr. *Swanston* and Mr. *Rogers*:—That is one point we intend to submit. (Further parts of the same affidavit were read, detailing the facts mentioned in the supplemental petition subsequent to the 13th November.)

Mr. *Anderdon*:—The same objection applies to this part of the affidavit.

Sir *J. Cross*:—What is the objection?

Mr. *Anderdon*:—My objection is, the matter disclosed in this affidavit is not in issue; all those matters posterior to the 11th of November.

Sir *John Cross*:—It is a material question, whether or not the agreement of the 13th of November was taken as a security to the satisfaction of the creditors. Every thing that bears on that question must be material; and the act of the parties subsequently to the

13th of November can be no otherwise material than to show that that was a security so accepted, or else subsequently that the company consented to the nonpayment of the debt within the time.

Mr. *Anderdon*.—They have not set it up. There is no such allegation.

Sir *John Cross*.—There is no specific allegation to that effect, but generally it was not an act of bankruptcy; and to make it an act of bankruptcy or not, these circumstances become very material.

Mr. *Swanston* and Mr. *Rogers*.—The petition states the institution of the suit: "That, under the circumstances aforesaid, your petitioners, on or about the 6th of November, filed their bill, claiming to be entitled to such general release and discharge as aforesaid, and otherwise to the benefit of the aforesaid deed and arrangement with your petitioners, and such suit is still pending in the said Court; but upon the said banking company, by its officers, being served with the subpoenas to appear to and answer the said bill, entered into a negotiation for a compromise with your petitioners in respect of the matters aforesaid, and thereupon it was agreed, on behalf of the said banking company, that they should give and execute to your petitioners such release as was and is claimed by them as aforesaid, and that the said banking company should pay the outstanding debts and liabilities of the aforesaid concern."

Mr. *Anderdon*.—How can it be pretended a special agreement bearing date the 13th of November, and all the consequences incident to that case, can be comprehended within those words, "that an agreement was come to, that the banking company should give and execute to the petitioners a release," &c.?

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Sir John Cross :—A negotiation was entered into. Does not that lay it open to the parties who allege the fact of such a negotiation to show the circumstances of which it consisted?

Mr. Anderdon :—With great deference, I should say, decidedly not. The rule is, not only to state the fact, but to state the circumstances on which you found the conclusion of fact. That which is now contended for would be at variance with sound rule of pleadings.

Sir John Cross :—We are not talking of the supplemental petition, but the affidavit.

Mr. Anderdon :—They have thought it advisable to file a supplemental petition of considerable length, comprehending every one of these facts.

Sir John Cross :—At present this is out of sight.

Mr. Anderdon :—I use that with reference to this, to show their own sense and view of the materiality of a record to justify that evidence. In any other court of judicature, law or equity, no one could contend for one moment all these special circumstances could be introduced into evidence without the necessary averment. The extent of one's experience in bankruptcy is to show that all the matters you rely on in affidavits are invariably stated in your petition. It would be quite abhorrent to all safety of parties in pleading, if this affidavit can be let in on this averment; namely, "a negotiation was entered into for a compromise with your petitioners in respect of the matters aforesaid, and thereupon it was agreed to, on behalf of the said banking company, that they should give and execute to your petitioners such release;"—being perfectly clear the terms of that agreement are material to our case. It is

manifest the agreement of the 13th is a conditional agreement. The evidence does not support it.

Sir *John Cross* :—That is an argument on the weight of evidence, after it has been heard.

Mr. *Anderdon* :—Independent of the necessity of putting all these matters in issue, when you look at the evidence, it does not support the averment.

Sir *John Cross* :—It appears to me that the allegation in the petition, that “subsequent to the filing of the affidavit a negotiation was entered into between the parties,” lets in all matters touching and relating to that negotiation; and it seems to me that the evidence of the agreement of the 13th of November is relative to the part of that negotiation. (The affidavit was then continued, letting in, in effect, all the matters stated in the supplemental petition.)

Sir *John Cross* :—(Addressing the counsel for the defendant.) Do you see any objection to trying the act of bankruptcy first?

Mr. *Anderdon* :—The petitioners counsel have built a great portion of their argument on the fact of an oppression exercised by the parties, who, having no debt, have sworn to a debt of 50,000*l*. That is misapprehension on the other side; we distinctly show a line was drawn.

Sir *John Cross* :—As yet that has not become material. Without going into that argument, do you see any objection to our trying the act of bankruptcy first, before we go into the question of debt?

Mr. *Anderdon* :—There is no objection to the act of bankruptcy raised by the petitioners, with the exception

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of the consideration not being stated on the face of the affidavit; and the next point, it is an oppressive transaction, because 50,000*l.* is not due; and next they say there is a misdescription, or something is said about the Grove Mills: those are the only objections they have taken.

Sir *John Cross*:—But what they say is this; you say they committed an act of bankruptcy on the 16th of November, which was the 22d day after they had been served with the notice to pay the debt to the amount of 50,000*l.* On that day then, by way of nonpayment, they committed an act of bankruptcy. Now, in answer to that, it is stated that you consented to the nonpayment on that day. That is the first point.

Mr. *Anderdon*:—That is an equitable objection to the fiat.

A creditor
 assenting to an
 act of bank-
 ruptcy cannot
 avail himself of
 it to support a
 fiat.

Sir *John Cross*:—It is like consenting to any other bankruptcy. If a petitioning creditor is consenting to an act of bankruptcy, can he take advantage of it?

Mr. *Anderdon*:—That confirms the act of bankruptcy, and makes it equitable.

Sir *John Cross*:—Is it an act of bankruptcy at all?

Mr. *Anderdon*:—Incontestably. All the cases would show that is a case in equity, and not a legal invalidity to the fiat.

Sir *John Cross*:—The first question raised, which is the most material to come to at first, is, Whether or not the debt not being paid within twenty-one days,—whether it was by your consent? Did you consent to the delay of payment, which delay constitutes, as you say, the act of bankruptcy? The first question is, Were you

a consenting party to that delay? The second question is, which comes to the same point, Whether or not you did not within the twenty-one days accept of a security that was then satisfactory to you? Now those are the two points to which we should first direct our attention.

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Mr. *Anderdon*:—Both of which affirm the legal validity of the fiat.

Sir *J. Cross*:—They affirm nothing. Admitting for argument sake it would amount to an act of bankruptcy, nobody seems to question if you had given your notice, and had done nothing during twenty-one days, and had a good debt to the amount of 50,000*l.*, then there was an act of bankruptcy; but it is said, there has been no act of bankruptcy of which you could avail yourself if you were consenting parties to the act of which you now complain, or if you accepted the security.

Mr. *Anderdon*:—That affirms the legal validity of the fiat, but precludes those who have been interested in taking it out in that view of the case from availing themselves of it; that reduces it to the equitable case.

Sir *John Cross*:—You may so put your argument.

Mr. *Swanston*:—Our case is as your Honour has had the goodness to put it: That we have on the 13th of November secured the debt to the satisfaction of the creditor: we are bound either to pay or to secure it to the satisfaction of such creditor. We have done it on the 13th of November; we then gave security. It was not until seventeen days afterwards they said they were dissatisfied. It is an *ex post facto* operation.

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Mr. *Anderdon* and Mr. *Bacon* :—There is no allegation on that subject. [Sir *John Cross* :—I understand the affidavits in support of the original petition stated, among other things, the agreement of the 13th of November.] [Mr. *Swanston* :—If I allege an agreement, am I not entitled to prove what it is?] There is no allegation in the petition on the subject. [Sir *John Cross* :—There is no specific allegation to that effect. They say there was a negotiation ; when the statement of that negotiation is laid before the Court, arises the question, whether, in the progress of that negotiation you did not enter into an agreement which was an acceptance of satisfaction.] We are not disputing the view the Court takes of it ; all we say is, there is no allegation that any thing was done in consequence of it, or any security was given, or that any agreement was come to between the parties which should satisfy the requisition of the act.

Mr. *Swanston* and Mr. *Rogers* :—

What is alleged is, there was an agreement between the parties ; that lets us in to prove the circumstances and the terms of the agreement ; when we have done so, then the question arises immediately in your Honour's mind. Here is a security given according to the terms of the statute. That has been a point on which we much rely. Upon the terms of the statute, if the debtor secures a debt to the satisfaction of the creditor, there is no act of bankruptcy. We say none has been committed, because the terms of the statute have been complied with.

We will call your attention now to the affidavits on the other side. On the point of the act of bankruptcy Mr. *Jackson* says, " True it is, as agent and on behalf of the banking company, he intimated to said *Thomas*

Bruton Powell that a notice would be served upon them (meaning thereby a demand of payment of the debt due from them to the said banking company), and that he at the same time assured him that such notice would be a matter of form, and they need be under no apprehension concerning the same; but deponent at the same time intimated to him that such notice would be given as preparatory to a bankruptcy in case of need, but that it would not be acted upon if Messrs. *Brown* and *Powell* honestly gave up all their estate; and such intimation was given under the assurance and impression that the estate was as represented by Messrs. *Brown* and *Powell*; and it was in this sense, and with reference to this step, and under such assurance, that deponent said that the notice would probably be matter of form: That such notice was not in fact acted upon until a discovery had been made that Messrs. *Brown* and *Powell* had abstracted from the concern, and appropriated to their own use, several large sums of money, as is hereinafter more particularly set forth."

There is an affidavit of Mr. *Winterbottom's*, who is a material deponent on this point. He does not contradict one word; he does not traverse the allegation in Mr. *Alexander's* affidavit. On the contrary, as he had alluded to the release which had been agreed upon, so he says, the reason why the said alleged agreement of the 13th of November had not been performed, was the discovery and disclosure of various transactions of *Brown* and *Powell* in receiving money, and otherwise, in express contravention of the terms of the deed of inspection, and the good faith and understanding of the parties, both before and since the said 13th of November, which were considered by the said board of directors to be such flagrant instances of breach of faith on the part of the said Messrs. *Brown* and *Powell*, and such direct and

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wilful breaches of their covenants contained in the said deed of inspection, as not to entitle them to the benefit of the said agreement; and moreover that it was impossible the said board of directors could rest satisfied that there were not other instances not yet disclosed of sums of money having been appropriated by the said *John Brown* and *Thomas Bruton Powell* to their own use, without the knowledge and consent of the said inspector or the said banking company, which ought to have been paid over or accounted for by them to the said banking company, pursuant to the terms of the said deed of inspection." Believes, "that but for the discoveries of the improper appropriations aforesaid by the said Messrs. *Brown* and *Powell*, of monies legally and equitably belonging to the said banking company, the said agreement of the 13th of November last, and the draft release and assignment, and general release and assignment founded thereon, would have been fully performed and executed by the said banking company."

Then let us see what happened on the 3d of October. Neither the chairman nor one of the directors make any affidavit as to the point. But nothing can be more absurd than these allegations, if they remained totally unanswered, in application to this case. In his letter Mr. *Winterbottom*, on the 30th November, says, "within three days the discovery has been made." No man has pledged his oath to any day. We ask a release, with a clause making that release void in case we conceal any property to which these gentlemen are entitled. They say you are not entitled to a release, because you have not given up the property. We ask you only to give us a release, the condition of which we have given up. We answer this charge of misappropriation by affidavits filed this morning. It appears these pretended transactions were known to the bank;

the officers of the bank were parties to them. We have now, and we tender to them, the bill for 1,000*l.*, which they pretended to have been improperly withheld; a bill drawn by one of their officers, which had been handed over by their own officer to us, and which is now ready to be handed over to them. We trust the Court will be quite satisfied in the overwhelming objections to which this fiat is exposed; there is quite sufficient to bring it to an end.

Upon the question of the sufficiency of the debt, there is the case of *Tatlock v. Smith* (a); and we cite it to establish the proposition, that the agreement of the 13th November has actually suspended this debt altogether, and therefore the debt is gone at law. Having established that the contract was continued up to the issuing of the fiat, the proposition is, on this case, that the debt was suspended by that contract.

The circumstances of the case of *Tatlock v. Smith* were these, "That by an agreement between the defendants and their creditors all the defendant's stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all the other usual clauses. The trustees carried on the defendant's business; paid the creditors 10*s.* in the pound. They then tendered for execution by the defendant a conveyance of all their estate, containing a clause of release, which the defendant objected to as insufficient, and refused to execute the conveyance. The instrument not having been executed by all the creditors, a meeting at which the defendant was called on to execute was adjourned, that the signature of every creditor might be obtained.

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Quare, how far a debt is suspended at law by the subsistence of a trust deed for the benefit of creditors, signed by the creditors, and still only in fieri, so as to become incapable of sustaining a fiat.

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Held, that plaintiffs who as creditors were parties to the above agreement, could not sue for their original debt, at least till the conveyance, such as it was, had been executed by all the creditors and refused by the defendants."

Therefore from this case we submit to your Honour this proposition, that while that contract remained in subsistence the debt was entirely suspended, and that there was no debt, be it what it may; legal, or whatever it may be, it was suspended by the operation and subsistence of that agreement down to the date of the fiat.

Sir *John Cross* :— (Addressing the respondent's counsel.)

Allow me to call your attentions to the state in which the matter is at present. You are considered as having shown a *prima facie* act of bankruptcy, unless they can impeach it by showing the act, such as it was, was done by your consent, and that you accepted a security. They have gone into that case, and now perhaps the best course will be for you to meet that case with all the circumstances which you think bear on that question.

The single question to which for the present I am confining my attention, and I wish at the same time to confine the attention of counsel, is the question of the act done by the parties after filing the affidavit, and until the 16th of November.

Mr. *Anderdon* and Mr. *Bacon* :—That will admit there was a debt of 50,000*l.* and upwards, or 50,000*l.* due at the time when the notice was given. If that is conceded on the other side then we shall know how to proceed on that part of the case.

Sir *John Cross*:—They concede it for the sake of argument; for the present you may take it so; but they say, whether it is 50,000*l.* or 500,000*l.*, there is no act of bankruptcy committed before the 16th of November.

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Mr. *Anderdon* and Mr. *Bacon*:—

Their objection to the act of bankruptcy is founded on three distinct subjects. First, they say that there is no consideration stated on the face of the affidavit, therefore you cannot sustain the fiat within the terms of the act of parliament.

Then the next point they make is, that there was no proper affidavit to support the fiat, independent of the first question of there being no consideration upon the face of the affidavit.

And thirdly comes the point suggested by the Court.

The first objection, namely, that there was no consideration stated on the face of the affidavit, has been illustrated by the other side by reference to the practice in bankruptcy, which, it is asserted, requires the whole of the consideration to be stated. Now that is a complete mistake, because not only is it so held by cases, but the present Lord Chancellor has decided that it is not necessary, in an affidavit to support the fiat, to state the consideration. (a)

That was a case in which the bankruptcy office had refused to receive an affidavit of debt because it did not state the consideration. It has been held by Lord *Eldon*, *ex parte Bryant* (b), then cited to the Lord Chancellor, that the consideration for the debt need not be

(a) Mr. *Anderdon* was counsel in the case here alluded to; but we have not been able to obtain its name or date. See *ex parte Harman*, 2 *Gl. & J.* 26. *Co. B. L.* 8.

(b) 1 *Ves. & B.* 211; 2 *Rose*, 1.

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stated in the petitioning creditor's affidavit; and on citing this case before his Lordship, and time taken to consider, he made an order to admit such an affidavit; and a fiat was issued on the affidavit so framed. Why is the affidavit, which is simply confined by the words of the statute to an allegation that the party is "justly and truly indebted" to them in such a sum, defective? He is merely, by the words of the act, to file an affidavit, in a particular place, that such debt or debts is or are justly due to him or them respectively, and that such person is a trader. There is not one word of consideration in the act; and to imply that to be necessary would be to introduce words which are quite beside the question when you are merely asking what the statute requires.

Sir John Cross :—I have regretted I have not had the good fortune to make myself understood. I have particularly requested you would confine your attention for the present to the question, whether or not these parties committed a default, between the 24th of October and the 16th of November, to constitute an act of bankruptcy? That is the question which I have endeavoured to confine counsel on both sides to for the present.

Mr. Anderdon and Mr. Bacon :—It is clear they have committed a default. Do they show they have complied with the requisites of the act? The obligation is with them. [*Sir John Cross* :—They show this: that as to their not complying with your demand for payment,—prompt payment of 50,000*l.*,—that you were consenting to the nonpayment of the money down to the 16th of November. That is what they contend.] But we say that objection does not arise on the face of the petition. They do not say by the petition they have done it, or by the affidavit; they do not make it part of their case.

They do not state their case on this ground, that with reference to any thing that took place between the parties, we did them damage in taking out this fiat. They do not say they have been precluded or delayed from complying with the notice because we proceeded with the negociation or compromise. Had they said so, what would our defence have been, now partially only adverted to? Why, that the petitioner knew all along, while we were going along with them, we told them distinctly we should sue out the fiat, and therefore we gave them no indulgence. If that is so, the whole case would fall to the ground; that is now asserted. And therefore, under these circumstances, it would be most material, in reference to a case of this great weight and magnitude, that the Court should find materials on which it should act; and the principle of that is this: it is not enough for the judge to suggest that which he thinks would found an equity; you must find that case proposed by the petition and the parties; and for this reason, that the parties address themselves to the defence of a case so shaped. Our case would have been completely altered. The evidence which we should rely upon as now satisfactory to establish those facts would be the very communication which they so triumphantly take out of Mr. Jackson's mouth to support the view of your Honour; and to say you can torture an expression made by our side, addressed to a totally distinct subject, not guarded by any of the provisions which would accompany a statement made, addressed to a particular equity,—that that can be read against them to establish an equity not in the pleadings, would be monstrous. The Court should decide, *Secundum allegata et probata*. [Sir John Cross:—The question is, do you prove a default committed? That is the question. The burden of proof of the commission

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Quere, the policy of a judge suggesting an equity to the parties, who have not themselves suggested it on the record, or called the attention of their opponents to it, so as to enable them to point their evidence to that mode of looking at it

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of that default is on you. You have made a *prima facie* proof by the nonpayment; then the question is raised, whether or not all the circumstances taken together are not to be considered.] That is not their case. It is a negative proposition; the affirmative rests with them. Their own petition expressly shows they have not complied with it. They do not put it on the ground they have not complied by reason of our misconduct and default. They say they were entitled to their release, and we, by refusing to give the release, are entirely in default throughout; and there hangs the matter,—not on the ground of our waiting until the 13th. Would any body say, pending arrangements with a view to wind up, if they could, amicably, that a man's action can be restrained, unless there is something in his conduct which makes it inequitable in him to prosecute his legal remedy? Unless there is an express or an implied understanding the party shall not proceed, on what ground can it be said the pendency of such a proceeding prevents proceedings in an action? They admit altogether that to be their case. How can we affirm a negative? We ask them to make out the fact that they have given satisfaction. It is their case; not ours. There is nothing in the pleadings that can warrant the assertion that they have done so.

Sir *John Cross* :—The counsel having, I presume, before this petition came into their hands, been instructed to dispute the question about the title for release, they have come here armed fully to discuss that question. It struck me, nevertheless, that there was another incidental and a shorter question to be considered in a court of bankruptcy, which was, whether the act of bankruptcy had or not been committed. It was not for me to decide the question which is depending

in the Court of Chancery, and where it will be much better decided than I can decide it here. I have thrown out the preliminary question, whether or not the default I have so often alluded to has in truth been committed. I was going to call your attention to the allegation in the petition, which opens a way to the present question:—“That under the circumstances aforesaid, your petitioners, on the 6th of November, and prior to the issuing of the fiat, filed their bill of complaint in the High Court of Chancery, claiming such general release; but upon the said banking company, by its officers, being served with the subpoenas to appear to and answer the said bill, entered into a negotiation for a compromise with your petitioners in respect of the matters aforesaid; and thereupon it was agreed to, on behalf of the said banking company, that they should give and execute to your petitioners such release as was and is claimed by them as aforesaid, and that the said banking company should pay the outstanding debts and liabilities of the aforesaid concern.”—There is an express allegation of an agreement made subsequent to the 6th of November, and, consequently, subsequent to the time when the peremptory demand was made, and notice served requiring prompt payment of 50,000*l*. That seems to me clearly to open the way to the point we are discussing.

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Mr. *Anderdon* and Mr. *Bacon*.—It may be said to open the way to the equitable point, which may depend on the conduct of the parties; but as your Honour has read it, it bears reference to an agreement which we show to be a nullity; and that will let in the case on which we resist that arrangement as a binding agreement. They do not say we neutralized their proceedings, or that they intended to take proceedings for the purpose of fulfilling the requisites of the statute. When the

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evidence was adduced, it was that of a conditional agreement, entirely of a different character. They seek to engraft it on the supplemental petition, which is not before the Court. If it was, it would not supply the deficiency. Supposing, as your Honour has already decided, this lets in evidence of the agreement, we say the evidence of the agreement does not support the allegation, because the agreement is entirely different. Their own case is an absolute agreement, notwithstanding there is a condition annexed to it which nullifies it. Your Honour has taken it up in this way, that the notice that was given, although a formal notice, was, from something that took place, nullified. That cannot be so; it would be no more than this if it had taken place with regard to the proceeding under an arrest. It is at least a little singular the discussion should have been mainly directed to the point to which your Honour should have called the attention of counsel, because the petitioners conceived their case was altogether different from that. They set up by the petition a case of certain equities, arising out of a deed of inspection, under which they say, in the events which have happened, they were entitled to a release; and although they state the issuing of the fiat and suit in Chancery, and that that suit in Chancery was compromised, still they came back to the relief to which they say they were entitled on the ground of the release, and urging that the release contracted to be given to them ought to have been considered as given; that there was no debt, and therefore there could have been no bankruptcy. It is not that point which counsel was called on to urge, nor any point contained within the record; but whether, because, after the affidavit had been made and notice served, a proposition was made by the petitioners, and accepted by the banking company, which, if it had been carried out, would

have had the effect to render it unnecessary to proceed further with the fiat, by giving time, or by waiving the necessity of their complying within the time with the requisites of the act of parliament, or by having accepted security or compensation of the debt, the bank were precluded from issuing the fiat. It is impossible to conceive an agreement more essentially conditional than this is. If it was to be put in the form of a deed to be executed, the condition would be apparent on the face of it. Such condition cannot be conceived without making the main part of it; disclosing the whole property would be a direct condition in the deed. The deed would be, according to the terms of this proposition, an assignment of all the petitioners had in the world. It would then contain a release from the bank; but there would come previous a defeazance or condition, that if it should afterwards turn out *Brown and Powell* had withheld or concealed any property whatever, then the release should be wholly void: so that to allege it is not merely a conditional and executory agreement, is wholly in vain. Then it is for the Court to consider what effect should be given to that agreement, with reference to the act of parliament; and that will become very important, not only in this case, but in many others. It is evidently the intention of the legislature that the twenty-one days mentioned in the act should be used, among others, for the purpose of compromise and settlement of the dispute between the debtor and creditor. If your Honour were to hold an executory and conditional agreement like this, whether executed, and whether the condition be complied with or not, was to be taken as compounding or securing the debt, in all cases it would have the effect of making it impossible for the creditor who has filed the affidavit to come within the same room with his debtor. He must hold no con-

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versation with him. For nothing can be more loose than this agreement. No terms in conversation can be stated which would not go quite as far as this conditional and unperformed agreement would go; and one of the ends of the act of parliament would be defeated if it was to be held that an agreement like this was compounding or securing a debt to the satisfaction of the creditor. It is no where alleged any thing has been done on this agreement, on the part of those who seek the benefit of it, which amount to compounding or satisfying the debt. [Sir John Cross:—Suppose the debtor had said, under such circumstances, “If you will give me time, I will give a warrant of attorney to confess judgment,” you would not make that an act of bankruptcy afterwards, because it was not entered up?] Because it was not given; not that it was refused, but because it had not been completely executed. Suppose it was impossible,—suppose he agreed to receive a bill of exchange in satisfaction of his debt, and a fraudulent bill was given him,—the consideration for the agreement would wholly fail. It could not be said in that case the creditor had been compounded with, or he had received a security which satisfied him in respect of his debt. What has been done here is very much like giving a fraudulent security. The parties to the agreement were to give up the whole of their property, and agreed not to receive or withhold any part of it; after that time, as we say, they did receive and appropriate to their own use part of that property which was stipulated to be the security with which the creditors were to be satisfied. It is in evidence at a much earlier period than that recently alluded to, when the first proposition for the deed of inspection was made, that the statement of all the property of the petitioners was laid before the bank, and that upon that statement, assuming that to be

true, the bank agreed to make the large advances which they have since made. It was of course expected by the bank that the statement so laid before them contained a full description of all the assets of the petitioners. The petitioners represented that it did; but that was not so. The more important point is, whether this can be said to be a good satisfaction. Nothing could be more satisfactory, except executing. [Sir John Cross :— Full satisfaction is one thing; but satisfaction for the time is quite another thing; a security with which they were satisfied, not necessarily amounting to a satisfaction of the debt.] The security with which they were for the time satisfied was this: they were assured the petitioners would assign to them all their property, and that they would conceal or withhold no part of it. If that was true, they were satisfied with it. Has it turned out to be true? Is it not in evidence that that representation has been falsified? [Sir John Cross :—I do not find any representation, as you describe it, in that agreement, to have been falsified. They say they will give up all they have in the world; is that satisfied? And if they concealed any part of it, the agreement shall be at an end. Have they not still kept by that agreement?] No; because they have received monies since, on the 17th November. [Sir John Cross :—It was either an act of bankruptcy on the 16th, or it was never an act of bankruptcy. The twenty-one days had expired; the 16th was the twenty-second day.] On that twenty-second day they had not made payment; that is quite clear. That they had not compounded, and had not given a security to the satisfaction of the petitioners, is equally so. It could not be said they were satisfied. They were not satisfied on signing the paper; that could not be satisfaction: that related to a thing to be done hereafter. If a year had passed, instead of the few days that

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did pass between the 16th November and the issuing the fiat, it would be to be discussed, whether, although they had been content to let a year elapse, they were not entitled, under the circumstances of fraud or misrepresentation, to revert back to the 16th November, and to say then the default was made, and they were at liberty then to issue the fiat. There was therefore no satisfaction in any respect whatever, nor security given to the satisfaction of a petitioning creditor. He has a right to resort to the fiat, or relinquish it if he thinks fit, or he has a right to decide at what time he will put it in force. It would be exceedingly hard on the parties in this case, and very dangerous as a general principle, to hold, that coming under such a conditional agreement as this could in any sense be held to be an expression of their satisfaction with the security which had been offered to them. They are satisfied if the security could be made. The security to them could not be made. Why? Only by reason of the conduct of those parties who seek the benefit of the words of the agreement. The spirit of it they are unable to perform.

With respect to the objections to the affidavit, one is, the description is wrong. These gentlemen are described as carrying on business under the firm of "The Grove Mills Company." Some mistake has been made on that subject. The notion is, the affidavit stated the debt to be due from the Grove Mills Company; that is not so: those words are introduced to describe the parties mentioned in the affidavit. Then it is said, inasmuch as the affidavit does not contain a statement of the consideration for the debt, it is therefore insufficient. It would be more satisfactory if something like authority had been referred to in support of that objection; there have been none. The reason why affidavits to hold to bail are made in a certain form, stating the considera-

tion, is, because the statute requires it. It may be it is an ordinary practice to state in the petitioning creditor's affidavit the consideration of the debt, and the precedent in the ordinary books of practice seems to be in that way. That may easily arise from the circumstance of the same persons who are engaged in preparing affidavits to hold to bail being the persons to prepare those for petitioning creditors debts; and knowing no harm could be done by introducing those words, that practice may have crept in; but, as has been stated, the Lord Chancellor's attention being drawn to the express point, he has decided no such statement is necessary; nor does the statute require it. If your Honour finds in one case the statute requires the statement, and therefore it is complied with, and in the other case the statute does not require it, your Honour will not hold on that part of the case that it is necessary that should be contained in it. The other objection is, this affidavit contains the words "and upwards." It means only this: these debtors owe 50,000*l.* at the least, and no less. The object of introducing the 50,000*l.* is to fix the amount for which the bail is to be given; no more is demanded, although in an affidavit to hold to bail the words "and upwards" are introduced to include any other amount which is not exactly ascertained. Your Honour knows, in practice, bail is never required for more than the one sum, giving no signification to the words "and upwards." For these reasons we submit the petition is unfounded, and should be dismissed. With respect to the supplemental petition, it is a mistake altogether, and an improper proceeding.

Mr. *Swanston*, in reply, was stopped by the Court.

Sir *John Cross*:—

I have considered it to be my first duty to inquire JUDGMENT.

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whether an act of bankruptcy has been committed upon the evidence before me, and that is merely a question of law, involving no consideration of equity on the one side or on the other; a question of law respecting which it is utterly immaterial to inquire whether there has been fraud or bad faith committed by either party.

As to those points, therefore, I have not for a moment given my attention; but I have confined my attention whether in point of law an act of bankruptcy has been committed, and I certainly do regret that the counsel on both sides having been involved in another dispute in the court of equity respecting the force and effect of a deed of inspection and the right of the parties to have a general release, have drawn their attention from the point to which I have invited them. But it is a point which I must determine before I can sanction this fiat; and if I were to say this is a valid fiat, or that it shall remain, the question would still be liable to be brought into a court of law, and viewed precisely on the ground on which I take leave to view it here.

The act of bankruptcy relied upon is this;—it is an act created by the new statute for the abolition of imprisonment for debt. The act provides, if any creditor, or one or more creditors, shall make affidavit of a sufficient debt and other circumstances, and give notice, and demand payment of his debt, and the party do not pay or give the securities required by the act within twenty-one days, he shall on the twenty-second day be deemed and taken to have committed an act of bankruptcy.

Then the question is, Whether he has committed that act of bankruptcy, which in the present instance consists, if at all, in not paying the debt which was demanded by the notice of Mr. *Jackson*, and not paying it

within twenty-one days? and the question, therefore, turns again upon the circumstances under which he did not pay.

Then the first consideration is, whether the creditor was a party to that act of default, as he now calls it?

Was he a party to it? If he was a consenting party to the default, and permitted the default, can he take advantage of it as an act of bankruptcy? We all know it is in every day's practice that no act of bankruptcy can be taken advantage of by a creditor who is a party to it. There is no principle of bankrupt law better settled than that. It is a question of law, and not, as was contended for by Mr. *Anderdon*, a point of equity, that invalidates the fiat; but it is a question of fact, which would arise in a court of law as well as here, whether or not an act of bankruptcy was committed? Now let us see whether the company were or not consenting parties to this default.

When the notice is given and the demand made by Mr. *Jackson* of payment of 50,000*l.* down, as a debt immediately due,—when he gave that notice it appears that he said “It was only a matter of form.”

Now I should lay very little stress on that if all the subsequent circumstances did not show that that was the light in which it was viewed by both parties. Well, nothing material occurred until the 11th of November, when Mr. *Alexander* proposed to go over from Halifax and to wait on the Company at Manchester, and to offer terms of accommodation. By the way, when I say nothing occurred, there was an important circumstance before that day occurred; a bill in equity was filed by *Brown* and *Powell* the bankrupts; the bill in equity was filed insisting that they were entitled to a general release for the acts then already done; that suit was then depending; the suit was commenced after demand

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of payment under the new act of parliament, and the bill was filed.

Well then, on the 11th November, with a view to come to some accommodation between the parties, Mr. *Alexander* proposed to wait on the Company at Manchester on the 13th of November. He did so; and then the result of what passed between the parties was, the agreement of the 13th was entered into, in which agreement I find nothing conditional; the agreement is a security, it is an undertaking to convey all the property they have in the world to the creditors, and not to ask for a general release if they should conceal any part of their property. There is no condition in that. Here is an absolute surrender of all the property they had in the world as far as concerns those two parties to the contract. An absolute agreement to convey all the property they had in the world, and to ask for nothing on the other hand in return but a release on condition they gave all up; that is the matter of condition which entitles them to some benefit, but there is no condition depending which would confer any future privilege on the banking company.

Accordingly that agreement is signed by both parties. Well, that was within three days of the day on which the act of bankruptcy would have been consummated, and when the company would have been entitled to have said "Now you are bankrupt,—you have not performed the condition required by the act; and therefore the 16th of November having passed you are bankrupt, and we cannot deal with you any longer." Why what does Mr. *Winterbottom* say? On the contrary, instead of looking at them as bankrupts, incapable of forming any contract, he writes to them to desire they will get forward with the deed which was to carry the short agreement into execution, although he knew perfectly

well—we must presume Mr. *Winterbottom* knew—all the circumstances which had occurred were necessary to constitute an act of bankruptcy if he had ever intended to avail himself of them; but, on the contrary, does not Mr. *Winterbottom* show by all his acts, from the 13th of November onwards, that he would just have said if he had been asked the question, what Mr. *Jackson* said before, “Oh! do not trouble yourself about a bankruptcy, that is only mere matter of form.” I cannot doubt that would have been the answer of Mr. *Winterbottom* if Mr. *Alexander* had said “But what do you do with the bankruptcy?” His whole conduct is inconsistent with having any idea whatever to the bankruptcy. Well, Mr. *Winterbottom* goes on, and desires the contract may be prepared, and that part which relates to the indemnity is to be drawn by the bankrupt’s solicitor, but the other, it would seem, is to be drawn by himself. There were to be two; he would draw one. He goes on drawing the agreement, which shows he stands on the agreement which he had accepted in satisfaction, not of the debt, but as satisfaction, *pro tempore*, of the demand which he had made payable within the twenty-one days.

It therefore appears to me that, as a matter of law, the company have by their acts, done by their agents Mr. *Jackson* and Mr. *Winterbottom*, clearly waived all intention to avail themselves of the default,—the expected default of the act of bankruptcy; that they have accepted something which they considered an equivalent satisfaction for the time, so as to render it unnecessary to proceed. In addition to that it appears that down to the 30th November, when Mr. *Winterbottom* seems to intimate an intention to repudiate the contract of the 13th November, he does by no means do so; he adheres to it; he says it must be stayed for the present;

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but desires that Mr. *Alexander* will come to him on Monday, and see him on the subject. So that the matter is still going on down to the 30th. All this satisfies me that they were content on the 13th of November to take the agreement as satisfaction at that time; such a satisfaction as to render prompt payment within twenty-one days unnecessary. That is the only kind of satisfaction which I think they gave; as such I think it was accepted.

Under these circumstances, I am of opinion there is no legal foundation for this fiat; that no act of bankruptcy has been committed; and that therefore it would be a great prejudice to both parties if I was to suffer this fiat to go forwards as a valid fiat, and lead them probably into very great expense to litigate it in other places, when I am perfectly satisfied it cannot any where be sustained.

Under these circumstances, it appears to me unnecessary to inquire, and I have purposely, as I have said before, avoided inquiring whether or not the petitioners are entitled, under all the complicated circumstances of this case, to a release such as they claim in their bill in equity. On that subject I give no opinion at all. Whether there is a sufficient petitioning creditor's debt, I give no opinion; because if there is no act of bankruptcy it is immaterial to inquire whether it is such a debt as could support a fiat at all. I give no opinion on that question, because it is immaterial unless an act of bankruptcy is proved. None is proved; and in my opinion this fiat should be superseded, and superseded with costs. As to the costs of the supplemental petition —?

Mr. *Bacon* :— We must deduct those costs.

Sir *John Cross* :— I do not see how, as it has not been

used. It has been admitted on all hands the question has been fairly raised. I find no fault with the preferring it; it was a prudent act; it turns out *ex abundante*; it was a very prudent act, because, inasmuch as the petition had not set forth in full that agreement, nor expressly relying upon it, there might be reason for doing it; but still I cannot say it was necessary.

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Mr. *Swanston* :—From the fact of adjudication it was necessary. That makes a supplemental petition necessary, as your Honour knows.

Mr. *Bacon* :—That we deny.

Mr. *Swanston* :—It is a nice question, whether on a legal objection the alleged bankrupt can come before the adjudication?

Quære, Whether on a legal objection the alleged bankrupt can come before adjudication to supersede the fiat?

Sir *John Cross* :—I have great doubts about that myself.

Mr. *Rogers* :—We must have amended the original petition if they are right in this.

Mr. *Swanston* :—I must request your Honour will not exclude costs of the supplemental petition.

Mr. *Anderdon* :—We complain an immense quantity of irrelevant matter has been put in this petition. The Court gives no judgment on that, and yet fixes us with the costs; to fix us with the costs of the supplemental matter, when the right way for the other side was to proceed by amendment. The Court can dismiss so much of the petition as does not relate to the subsequent fact of adjudication, with costs.

Everybody knows whenever a decision is made in this way, the opinion of the Court being taken, the parties never present a supplemental petition to bring that matter before the Court. You having decided that

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you will discharge the fiat with costs, I think, looking at the quantity of matter your Honour has not considered at all, you will say, at least as to the supplemental petition, that the costs should be set off. It is the mere justice of the case.

Sir *John Cross* :— My opinion is, that the petitioners should have their costs of the original petition, and no costs on either side as to the supplemental petition.

The fiat was therefore annulled, with costs; but no costs on either side of the supplemental petition.

C. of R. *Ex parte* JAMES JULIUS STOCKEN.—In the matter of OLIVER THOMAS JAMES STOCKEN.
 March 16,
 1839.

Petition to stay certificate at-
 tested thus,
 "Witness *A. B.*,
 solicitor for the
 petitioners,"
 held good.
Quære, Whether
 a petition to
 stay a certificate
 holds good be-
 fore the certi-
 ficate has been
 allowed or
 signed?
 Certificate can-
 not be stayed
 for misconduct
 anterior to the
 bankruptcy.

THIS petition stated, that in, prior, and subsequent to the year 1818, *John Stocken*, the father of the petitioner, carried on business in copartnership with his brother, *William Stocken*, as brewers at Walham Green, in which they were interested in equal half shares:

That on the 6th July 1818 the said *John Stocken* made his will, whereby, after reciting that he was (jointly with his said brother, *William Stocken*) seised and possessed of copyhold and leasehold lands, tenements, and hereditaments in Walham Green, he devised his undivided moiety in the said copyhold and leasehold property unto the said *William Stocken*, *Thomas Carlton*, and *Benjamin Dawson*, in trust to receive the rents, and to apply the same according to the directions of the will:

That the said *John Stocken* died on the 31st May

1820, leaving his said son and daughter, both then under age, him surviving, and that his will was afterwards proved by the said *William Stocken* and *Benjamin Dawson* :

That the said *William Stocken* died on the 23d February 1824, having first made his will, bearing date 1st November 1823, whereby (amongst other things) he devised unto his son, *O. T. J. Stocken* (the present bankrupt), all his copyhold messuage, brewhouse, and premises at Walham Green :

That respecting this property a suit had been pending in chancery from the year 1827, which was heard in 1830, and the accounts were referred to the master :

That the petitioner's solicitor had been proceeding upon these accounts before the master, and also out of the master's office, with all possible diligence, ever since the said decree was made and the accounts put in, but without being yet able to complete the said accounts, or to obtain the master's report :

That the accounts directed by the said decree had been gone through down to the 7th November 1835, and partly also from that time down to the end of the year 1837; and upon the foot of the said accounts there appeared to be due from the estate of the said *William Stocken* to the estate of the said *John Stocken* 3,825*l.* 1*s.* 9*d.* :

That upon the accounts so taken there appeared to be due from the said bankrupt to the estate of the said *John Stocken*, in respect of a moiety of profits received by the said bankrupt, from the death of the said *William Stocken* on the said 23d day of February 1824 to the 7th November 1835, up to which time the said accounts have been gone through as aforesaid, the sum of 5,157*l.* 5*s.* 5*d.* :

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That upon the further accounts, subsequent to the said 7th November 1835, there appeared to be a further balance or sum of 1,652*l.* 9*s.* 7*d.* due from the said bankrupt, in respect of a moiety of the profits of the said brewery from the said 7th November 1835 to the said 14th July 1838:

That, in addition to the said several sums of 5,157*l.* 5*s.* 5*d.* and 1,652*l.* 9*s.* 7*d.*, amounting together to the sum of 6,809*l.* 15*s.*, so appearing to be due by the said bankrupt in respect of a moiety of the profits of the said brewery, the said bankrupt was also indebted to the estate of the said *John Stocken* in the sum of 595*l.* 10*s.* 10*d.*, for rents of the said *John Stocken's* real and other estates received by the said bankrupt:

That on the 21st of November last a fiat issued against the bankrupt:

That a supplemental bill was filed against the assignees:

That the commissioner had admitted a claim for 100*l.* to be entered for the petitioner, without prejudice, and directed notice of any application by the bankrupt for his certificate to be given to the petitioner:

That various delays had been interposed by the bankrupt throughout the whole of the proceedings in the said suit, whereby the petitioner had hitherto been prevented from obtaining the master's report upon the accounts directed by the decree, which would otherwise have long since been obtained.

(The petition then stated the mode in which (as the petition alleged) the accounts had been delayed:)

That all that remains to be done in the master's office, preparatory to the master's making his report, was to go through some undisputed items in the two discharges of the bankrupt, as to the brewery and as to *William Stocken's* personal estate, and to go through

the charge and discharge consequent upon the examination of the bankrupt, sworn on the 19th of November last, and the further accounts from the 14th of July to the 19th of November; all which the petitioner considered might be accomplished in the course of a month, if the bankrupt and his assignees would give the necessary facilities, and co-operate with the petitioner for that purpose:

That the petitioner believed that, if the bankrupt obtained his certificate before the accounts were gone through, and the master made his report, the same system of delay and expense which had hitherto been practised by or on the part of the bankrupt would be continued; and that it was therefore of the highest importance to the petitioner that the certificate should be stayed till all the accounts were gone through, and the master had made his report, and that such report should be made with the utmost possible despatch:

That the whole of the debts proved under the fiat amounted only to 1,402*l.*, which was less than the debt already ascertained to be due to the petitioner.

The petition prayed that the brewery might be sold, as in the case of a mortgage, and that the allowance of the certificate might be stayed in the meantime, and until the petitioner should have made such proof; and also until after the master should have made his report in the said suit, and until the debt which might thereupon, by an order or decree, be found or declared due from the bankrupt to the estate of *John Stocken*, &c.

The petition was signed and attested thus:—

“ *James Julius Stocken.*

“ Witness *A. Gordon*,
Solicitor for the petitioner.”

Mr. Swanston and *Mr. Russell* for the petition.

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1839. Sir *F. Pollock* and Mr. *Bethell*, for the respondent, urged, as a preliminary objection, that the attestation was defective. Lord *Eldon's* order of August 12, 1809, directs, "That the signature of each person signing as a petitioner shall be attested by the solicitor actually presenting the petition, or by some person who shall state himself in his attestation to be attorney, solicitor, or agent of the party signing in the matter of the petition." (a) An attestation by a solicitor is bad, *ex parte Wilkinson*. (b)

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Sir *George Rose* :— Since the establishment of the new Court, the strictness which formerly existed has been relaxed, and the Court looks through the form, to the spirit of the order. *Ex parte White* (c); *ex parte Wiggins*. (d)

Sir *F. Pollock* :— Not in the case of a certificate, which is *strictissimi juris*. *Ex parte Hirst* (e); *ex parte Tanner*. (f)

Mr. *Swanston* :— The attestation is sufficient; it is, "Witness *A. Gordon*, solicitor for the petitioner;" which, as Mr. *Gordon* is the solicitor actually presenting the petition, has always, and in the cases cited, been held sufficient.

Per Curiam :— Objection overruled.

Sir *F. Pollock* :— My next preliminary objection is, that this is a petition to stay a certificate before the cer-

(a) Lord *Eldon's* order, 12th August 1809. (d) 1 *D. & C.* 497.
(b) 1 *G. & J.* 353. (e) 1 *G. & J.* 76.
(c) 3 *Dea. & Ch.* 366. (f) 2 *D. & C.* 563.

tificate has been allowed. *Ex parte Groom (a)*, in which the Chancellor caused inquiry to be made in the offices, and stated that no instance of such a petition could be found.

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Sir *George Rose* :— I have always understood that the petition must state that the certificate was signed. I must look into this point. Was the petition presented before or after the certificate was signed? But I have read the petition carefully, and there appears to me to be on the face of it an unanswerable objection, as far as relates to the certificate: the allegations of misconduct are all before the bankruptcy, but there is not any allegation as to misconduct since the bankruptcy; and it has been settled for years that misconduct before the bankruptcy is not any objection to the certificate.

Petition as to certificate dismissed.

(a) *Buck*, 40.

APPENDIX.

No. 1.

2 & 3 Vict. Cap. 29.

An Act for the better protection of parties dealing with persons liable to the Bankrupt Laws.

[19th July 1839.]

WHEREAS by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled “An act to amend the laws relating to bankrupts,” it was among other things enacted, that all payments really and *bond fide* made by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and *bond fide* made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: And whereas by an act passed in this present session of parliament, intituled “An act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and *fiats* in bankruptcy,” it is amongst other things enacted, that all conveyances by any bankrupt *bond fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed: And whereas it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any fiat against them:

[a]

All Contracts,
&c. *bonâ fide*
made by and
with any bank-
rupt previous to
the date and
issuing of any
fiat to be valid,
&c. if no notice
had of prior
bankruptcy.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.

Act may be
repealed.

II. And be it further enacted, That this act may be repealed or altered by any other act in this present session of parliament.

No. 2.

2 & 3 Vict. Cap. 37.

An Act to amend, and extend until the first day of January one thousand eight hundred and forty-two, the provisions of an act of the first year of her present Majesty for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury. [29th July 1839.]

7 W. 4. &
1 Vict. c. 80.

WHEREAS by an act passed in the first year of the reign of her present Majesty, intituled "An act to exempt

CASES

IN

BANKRUPTCY.

In the matter of THOMAS COURTNEY and
GEORGE COURTNEY.

Special Case,

On the Appeal of GEORGE POLLARD from the Court of
Review to the Lord Chancellor. (a)

L. C.
*Aug. 8, &
Nov. 6,
1838.
Jan. 20,
1840.*

THE above-named bankrupts, together with *Thomas Courtney* the younger, for many years carried on the business in partnership together, in London, and at Kirkaldy, in Scotland, as clothiers.

A piece of land at Kirkaldy was purchased in the name of the said *Thomas Courtney* the younger with the monies of the partnership, and for partnership purposes; and the conveyance was made to the said *Thomas Courtney* the younger, who resided and conducted the business of the said partnership in Scotland.

By an instrument, called a disposition or assignment, bearing date at Kirkaldy the 9th of March 1815, under the hand of *Richard Joseph*, the said piece of land was

being resident here, the property came to the hands of the assignees charged with the equity, and therefore they were bound to pay the mortgage debt out of the proceeds of the particular property.

According to English law, an equitable mortgage was effected of Scotch property. The special case found, that "by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit:—" Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors,

(a) See this case on the original hearing in the Court of Review, 3 *Mont. & Agr.* 340.

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sold, alienated, and disposed of, to and in favour of the said *Thomas Courtney* the younger, his heirs and assigns, heritably and irredeemably, by the description therein mentioned, and of such piece of ground and appurtenances, heritably and irredeemably, heritable estate, and seisin, real, actual, and corporeal, was duly given and declared to the said *Thomas Courtney* the younger on the 10th day of October 1815, as is shown by the instrument of seisin in favour of the said *Thomas Courtney* the younger, bearing date the 10th day of October 1815, and duly recorded in the first book of the new particular register of seisin, reversions, &c., for the burgh of Kirkaldy, conformably to act of parliament.

The said partnership firm afterwards built and erected upon the said piece of land certain buildings, the expenses of which were defrayed out of the partnership funds, and the business of the said partnership was carried on upon the said premises until the death of the said *Thomas Courtney* the younger, which took place in the year 1817; and from that time the above-named bankrupts continued to the time of their bankruptcy to hold and occupy the same premises as part of their partnership property, and carried on their business there, and expended further large sums of money in erecting other suitable buildings for the purpose of their said trade, and on the partnership account.

The said bankrupts, after the death of the said *Thomas Courtney* the younger, and before their own bankruptcy, (that is to say,) on or about the 13th day of March 1832, being then largely indebted to the appellant, in order to induce him to give them further credit, delivered to and deposited with the appellant the said instrument called a disposition or assignment, bearing date the 9th day of March 1815, and the said instrument of seisin, dated the 10th day of October 1815,

being the title deeds of the said piece of land, and also a certain memorandum in writing signed by them in the words and figures following:—

“ London, 13th March 1832.

“ Mr. *George Pollard*, trading under the firm of *John Pollard and Co.*

“ Sir,

“ We, the undersigned *Thomas Courtney* and *George Courtney*, do herewith deposit in your hands a certain disposition or assignment, dated 9th March 1815, together with a certain instrument of seisin, dated 10th October 1815, whereby certain lands are vested in *Thomas Courtney* junior, deceased; but inasmuch as the said property was purchased out of the partnership funds, and for partnership purposes, and we the undersigned having since become the legal and only owners of the said property, do hereby give you a lien thereon for general balance of all or any monies that now are or may hereafter become due to you from us to the extent of 2,000*l.*, and we agree that you shall stand in the nature of equitable mortgagee; and on demand we further agree to make, do, and perfect all such acts for the better securing to you of any such monies as aforesaid.

“ We are, Sir,

“ *Thomas Courtney.*

“ *George Courtney.*”

The appellant, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th day of December 1832, at which time the appellant was a creditor for the sum of 1,927*l.* 4*s.* 6*d.*, and in respect of that sum the appellant considered himself and claimed to be an equitable mortgagee of the said hereditaments.

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The said *Thomas Courtney*, who was the youngest son of his father, having died without having made any disposition of the hereditaments in question, the same, according to the law of Scotland, devolved on the above-named bankrupt, *George Courtney*, who was his immediate brother, as his heir of conquest.

The appellant preferred his petition in this matter to the judges of the Court of Review, setting forth the matters above stated; and further, that under such circumstances he was advised, that inasmuch as the hereditaments in question legally descended unto the said *George Courtney*, as the heir at law of the said *Thomas Courtney* deceased, subject to the equities aforesaid in favour of the partnership firm, the same hereditaments were well and effectually mortgaged in equity to the appellant by the aforesaid memorandum of deposit, and that the appellant was then entitled to go before the commissioner, and to take an account of the principal and interest which might be due and owing to him upon or under his aforesaid mortgage security, and to have the same hereditaments sold; and thereupon prayed, amongst other things, that it might be declared by the Court that the appellant was an equitable mortgagee of the said hereditaments at Kirkaldy for the principal sum of money which was due and owing to him from the said *Thomas Courtney* the elder and *George Courtney*, at or before the date of the fiat of bankruptcy against them, and the interest thereon, and that the same hereditaments might be ordered to be sold accordingly in the usual manner; and that all necessary and usual directions might be given for the necessary and proper measures for taking up the title to the said hereditaments according to the law of Scotland, and for the conveyance of the said hereditaments to the purchaser or purchasers thereof; and that all proper and

necessary parties might concur in and do and execute all proper acts and deeds for that purpose, and for further consequential directions.

The said petition came on to be heard before the judges of the Court of Review on the 29th day of April and 2d of May 1837, when, upon reading the affidavits filed in this matter, and hearing the admissions and arguments of the counsel, the Court found that by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit of the title deeds, and by the written memorandum in the petition mentioned, and expressed its opinion that on that account the Court could not make the order prayed for; the case, however, was allowed to stand over for further consideration; but on the 18th day of July following the Chief Judge stated the judgment of the Court to be, that the said petition should be dismissed, with costs; and an order has been drawn up accordingly.

The appellant conceives himself aggrieved by such dismissal of his petition, and submits that the prayer thereof ought to have been granted, and thereof appeals.

Mr. *Swanston* and Mr. *Anderdon*, for the appellant:—

This is an appeal from the decision of the Court of Review, on the petition of Mr. *Pollard*, to have his mortgage account taken, and for the sale of the mortgaged property. If the property had been situate in England it is manifest that the petitioner would have been entitled to the order declaring him an equitable mortgagee, and to have had a sale of the property. But as the property lies in Scotland, the laws of which country are said to recognize neither liens nor equitable mortgages, the question resolves itself into this, namely, whether, as all the parties to the transaction resided

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in England,—as the contract took place in England, and as the property, although situate in Scotland, is to be administered in England under an English fiat of bankruptcy, the *lex loci contractus*, rather than the *lex loci rei sitæ*, ought not to prevail. It is consonant to every principle in equity, as well as bankruptcy, that assignees in bankruptcy can acquire no higher title in the bankrupt's property than the bankrupt himself would possess. They only take it subject to all the equities,—all the contracts morally binding in a legal sense; that is, liable to all contracts not *malum in se*, or against law or morality. In the present case we say they take the Scotch property subject to our equitable mortgage. If bankruptcy had not intervened, can there be a doubt we should by bill in equity have had a right to compel the now bankrupt to execute a legal mortgage? Wherever the property were situated, and whatever local law might attach upon it, this Court, *agens in personam*, would, as having jurisdiction over the person contracting, compel specific performance, or at least give effect to the contract by something equivalent thereto. This is a contract operating on the conscience of the party; and the assignees taking the property thus affected are as much bound by it as the bankrupt himself. They are not mere alienees, but in fact, to the fullest extent, represent the bankrupt in all respects. *Mitford v. Mitford* (a) determines that the assignment in bankruptcy passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. In *Saunders v. Leslie* (b) it is said, by Lord Eldon, that assignees of a bankrupt cannot be in a better situation than the bankrupt himself, and they are, in respect to his estate, liable to all equities that would attach upon the estate

(a) 9 Ves. 100.

(b) 2 Ball & B. 515.

in his possession. So in *Grant v. Mills* (a) and *Chapman v. Tanner*. (b)

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The other side contend that the property is not affected with this equity, because the law of Scotland did not recognize any such title. But it comes to the assignees charged in conscience and equity with that which, without bankruptcy, the Court would have enforced, and therefore that argument cannot prevail. We do not contend in favour of any jurisdiction to bind a foreign judicature, or to affect the land *per se*; but the Court gets at the remedy by exercising a jurisdiction it manifestly has over the party, and preventing him from dealing with the property devolved on him otherwise than according to justice and conscience, such as, being within the jurisdiction, he is bound to observe. *Bushby v. Munday*. (c)

That species of title which we seek the Court shall declare us to have is not in contravention of the law of Scotland; it is not prohibited there, nor is there any law declaring that a party possessed of real property there should not pledge his property. At most the law is silent upon the subject, inasmuch as it provides no remedy for the equitable mortgagee. Though it may be right that such a contract as this should be void as against a subsequent purchaser, at the same time it would be equally inconsistent with justice as with common sense to suppose the laws of Scotland would not enforce it as between the contracting parties, or, by a parity of reason, against a mere assignee. English courts do not in general recognize this kind of title any more than Scotch, but the parties find assistance and remedies for the deficiency of the common law by resorting to courts of equity. Our laws are prohibitory

(a) 2 *V. & B.* 309.

(b) 1 *Vern.* 267.

(c) 5 *Mad.* 297.

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 COURTNEY
 and another.

of and inimical to non-communion in property between husband and wife; yet in bankruptcy it is every day's practice to attach a title which does not exist in law, not indeed a title to the property of the wife, but a right to claim from the assignees taking the benefit of it some provision commensurate to the property itself. That is all we ask in the present case; not the property itself, but something from the assignees equivalent thereto. Until recently, if a tenant in tail contracted to bind the entail, the Courts, as against the heir in tail, could not decree specific performance, so as to affect the land itself, but, acting against the person, they could imprison the party on whom by law the estate devolved for as long as the contumacy to their orders continued. We contend that the *lex loci contractus*, and not the *lex loci rei sitæ*, must prevail. Until the recent statute, 6 G. 4. c. 16. s. 64., the land in Scotland of a bankrupt did not pass by the English commission, and assignees could only reach it by instituting proceedings to carry into effect the obligation attaching on it by the assignment. *

There is in this case a trust affecting the land; and having already shown there is nothing prohibitory in the law of Scotland, we admit that no trust or contract can attach to or affect land which is contrary to the law. *Ex parte Borrodaile* in the matter of *Rucker* (a) does not apply here, because there it was found that the laws of Demerara declared void the creation of any interest in slaves, (the subject of that petition,) unless the title was made apparent by the intervention of certain forms, which in that case had been disregarded. Fortunately for the petitioner, the property, except for the bankruptcy, stands precisely in the same position as when the contract was entered into; no subsequent and superior

(a) 2 Mont. & Ayr. 398.

rights, according to Scotch law, having intervened. So that, as we contend, the Court has simply to deal with the question as though the party contracting had been living, and had remained solvent.

Mr. *Russell* and Mr. *Bethell*, for the respondents: —

The finding of the Court of Review is conclusive. The forms of conveyance required by the laws of Scotland have not been adopted; but it is said that an equitable right is created, binding on the conscience of the assignees. The laws of Scotland regard an equitable holder as a perfect stranger. According to our notions, an equitable mortgagee is in equity the owner of the estate; but those laws recognize no such title; it is an estate in land which by them cannot exist. They say, on the other side, this contract would have been enforced in Scotland if no bankruptcy had intervened; but no authority has been shown to that effect. Bankruptcy having intervened, all rights against the person of the bankrupt are ended, and the assignees take his property only subject to the equities affecting *the property*. The question is not, how far the bankrupt was bound, but how far the estate was affected. That is at once answered by this, that the law of Scotland recognizes no title whatever as arising out of a mere equitable charge. The estate is therefore not charged. But it is said that it is charged through the conscience of the party. The party whose conscience is affected is not before the Court. The assignees are here, and they are only required to administer the estate, subject to the equities which have already attached to it. Assignees in general take according to equities affecting the bankrupt. But in what sense is that expression used? Not as to those equities which merely affect the bankrupt

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POLLARD.

In the matter
of
COURTNEY
and another.

Nov. 6.

1838.
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 of
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 and another.

personally, but those only which specifically affect the property which passes by the assignment; and this brings it back to the old position, that the *lex loci rei sitæ*, by which the law of England determines rights as to property abroad, recognizes no lien or title whatever.

The appellant must, before he proceeds a step further, make out that he is owner of the estate in question according to the law of Scotland, which he cannot establish.

Mr. *Swanston*, in reply: — The question is, whether the contract is valid as against the assignees to an extent to charge the property as it would have been chargeable if no bankruptcy had happened. There is this difference lost sight of by the respondents, that the law regarding contract is decided by the *loci contractus*, and that regarding the land by the *lex loci rei sitæ*. The Court must deal with this subject, not as land but as contract, and can work out the equities of the contract by its order upon the assignees concerning the property come to their hands. The authorities referred to show, that a contract to this effect may be good, though it can give no lien upon the land. A contract or equitable mortgage will not charge the legal estate in England more than in Scotland, except by the very means we now seek to adopt, viz., through the conscience of the party. It is said we are proceeding by the form of the prayer of our petition against the estate, rather than against the person. But if the Court were to adopt such an argument, it would be regarding the form rather than the substance of the petition, and thus do an injustice, not usual in courts of equity. If this petition were granted, and the proceeds of the property handed over to us, the law of Scotland would not be infringed.

We do not seek to establish a legal title to the property; all we ask is, that the contract should be enforced, and the proceeds of the estate given to us.

His Lordship took time to consider his judgment.

The LORD CHANCELLOR:—

The short result of the facts of this case, as stated in the special case, by which I am bound, is, that the bankrupts were absolutely entitled, as part of their partnership property, to some land in Scotland, the legal title being in *George Courtney*, one of the bankrupts; that the firm, being indebted to the petitioner, *George Pollard*, in order to induce him to give them further credit, deposited with him the disposition and instrument of seisin, being the title deeds of such land, and signed and gave to him a memorandum in writing, dated the 13th of March 1832, declaring that they thereby gave to *Pollard* a lien upon the land for the general balance of all or any monies that then were or might thereafter become due to him from them to the extent of 2,000*l.*, and they agreed that he should stand in the nature of an equitable mortgage thereof; and, on demand, they further agreed to make, do, and perfect all such acts for the better securing to him of any such monies as aforesaid; that *Pollard*, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th December 1832, at which time he was a creditor for the sum of 1,927*l.* 4*s.* 6*d.* The only other facts stated in the special case, material to the present question, is, that by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit of the title deeds, or by the written memo-

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Ex parte
POLLARD.
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 POLLARD.
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random. The question is, whether *Pollard* is, under these circumstances, entitled to have his debt paid out of that part of the estate of the bankrupts which consists of their property in Scotland, in preference to their general creditors; or, in other words, the assignees being liable to all the equities to which the bankrupt was subject, whether such a deposit and agreement, made and entered into in this country, gave to the creditor such a title as against his debtor to have the agreement performed and the debt paid out of the property in Scotland, the subject of such deposit and agreement. The special case also finds that the deposit and agreement does not by the law of Scotland create any lien or equitable mortgage upon the estate. By this statement of the law of Scotland, which, sitting here, I must consider as a fact, I am bound, but so far only as the statement goes, and that does not find any thing contrary to the well known rule, that obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland, but that by the law of Scotland no lien or equitable mortgage was created by the deposit and agreement; by which must be understood that the law of Scotland does not permit such deposit and agreement to operate *in rem*, and not that they may not give a title to relief *in personam*. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the

court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The observations of Lord *Hardwicke* in *Penn v. Baltimore* (a) are founded upon this distinction. In *Lord Cranstoun v. Johnson* (b), Lord *Alvanley*, upon principles of equity familiar in this country, set aside a sale in the Island of St. Christopher, by the laws of which country the sale was perfectly good, no such principles of equity being recognised by the courts there, saying, "With regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England." In *Scott v. Nesbitt* (c), Lord *Eldon*, in the face of the master's report finding that there was no law or usage in Jamaica for a lien by a consignee in respect of supplies furnished to the estate, directed consignees to be allowed such expenditure in their account with incumbrancers. Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies and elsewhere out of the jurisdiction of this Court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland

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Ex parte
POLLARD.In the matter
of
COURTNEY
and another.(a) 1 *Ves.* 454.(b) 3 *Ves.* 182.(c) 14 *Ves.* 442.

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Ex parte
POLLARD.
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 of
COURTNEY
 and another.

no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the courts of this country from giving such effect to the transactions between the parties as it would have given if the land had been in England? If the contract had been to sell the lands a specific performance would have been decreed; and why is all relief to be refused because the contract is to sell, subject to a condition for redemption? The substance of the agreement is to charge the debt upon the estates, and to do and perfect all such acts as may be necessary for the purpose; and if the Court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will give effect to this equity by paying out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it, which is what the creditor asks. The special case finds, that the deeds were deposited and the agreement signed by the bankrupts in order to induce the creditor to give them further credit; and that he, relying upon the security of the hereditaments so charged to him, continued to give credit to the bankrupts to the time of their bankruptcy. The transaction is in no respect impeached, and there is no competition with any person having obtained a title under the law of Scotland. The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affected the bankrupts. To deny to the creditor the benefit of this security would be an injustice which, if unavoidable, would be much to be regretted. In giving effect to it I act upon the well known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only

order that to be done which the parties may by that law lawfully perform.

I reverse the judgment of the Court of Review, giving to the creditor payment of his debt out of the proceeds of the estate. (a)

Mr. *Russell* then asked leave to carry the case upon appeal to the House of Lords, but this his Lordship refused.

Judgment of the Court of Review reversed.

Mr. *Russell* this day applied, under the 37th section (b) of 1 & 2 Will. 4. c. 56., and *ex parte*, for leave to appeal

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Ex parte
POLLARD.
In the matter
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COURTNEY
and another

L. C.
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1840.

(a) There is a case of *Rothschild v. Currie* bearing upon this question still pending in the Court of Queen's Bench. For other authorities it is thought sufficient to refer the reader to those cited on the hearing of the petition in the Court of Review, 3 *Mont. & Ayr.* 540.

(b) "And be it enacted, that in case the Lord Chancellor shall deem any matter of law or equity brought before him by way of appeal from the Court of Review to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords, and not by the Lord Chancellor, then and in such case the Lord Chancellor or the Court of Review may direct

the whole facts whereupon such question of law or equity shall arise to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House of Lords in like manner as other appeals are preferred to that house: Provided always, that the cases to be lodged by the parties in the House of Lords shall be confined in matter of fact, in cases of appeal from the Lord Chancellor, to setting forth the special case brought up to the Lord Chancellor from the Court of Review, and in cases of appeal from the said Court of Review, to setting forth a special case, to be approved and certified in manner herein-before provided touching appeals to the Lord Chancellor, and to such arguments on the point of law as the parties may be advised to state."

Leave given by
the Lord Chan-
cellor to appeal
to the House of
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to the House of Lords against the above decision, on account of the very important bearing it would have upon the Scotch law. It was a novel application, but clearly within his Lordship's discretion to grant, if he thought proper.

The LORD CHANCELLOR said it was placing a judge in a very embarrassing position to leave it within his discretion to grant an appeal or not against his own judgment. He, however, thought this a proper case for an appeal to the House of Lords, and allowed it accordingly.

Mr. *Anderdon*, at a later period of the day, appeared to oppose the application, and pressed on his Lordship's attention the fact, that on the original hearing of the special case his Lordship had refused what was now asked. He also suggested, that if his Lordship was nevertheless disposed to grant Mr. *Russell's* application, the special case, being in some respects erroneous, ought to be re-stated.

The LORD CHANCELLOR thought he could not refuse the appeal, and said, that as he was himself concluded by the special case as it came from the Court of Review, the case must go in the same shape to the House of Lords.

Accordingly, leave was given to appeal to the House of Lords.

Ex parte RICHARD GIBSON.—In the matter of
RICHARD GIBSON.

C. of R.
Jan. 22,
1839.

THIS was an application, by motion, that an affidavit of debt sworn and filed under the 1 & 2 Vict. c. 110. s. 8. (the abolition of arrest act), and a notice annexed thereto, should be taken off the file, or indorsed by the officer as withdrawn or abandoned.

Mr. *Swanston* in support of the motion.

Mr. *J. Russell*, *contrà*, contended that the Court had no jurisdiction to make any such order, and if it had, the application could not be granted upon motion.

Per Curiam.—We had better hear the case.

The facts upon which the application was grounded were as follows:—On the 31st of December 1838 the above *Richard Gibson* was served with the copy of an affidavit sworn at Birmingham upon the same day, which was in substance as follows: “*Samuel Willis* of Birmingham in the County of Warwick, button maker, maketh oath, &c., that *Richard Gibson* of, &c., is justly and truly indebted to this deponent, and to *Samuel Sutton*, *Henry Harrison*, and others, his copartners in trade, in the sum of 180*l.* for a call of 1*l.* per share upon 180 shares of the joint stock of the Birmingham Patent Horse Shoe and Iron Tip and Heel Company, held by the said *Richard Gibson*; and this deponent saith that the said *Richard Gibson* is a trader, &c. Sworn at Birmingham, &c., 31st December 1838.” And at the same time he was served with a notice as follows:—“ To Mr. *Richard*

The affidavit of debt, under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8. (a), was not filed till after the notice, required by that section of its being filed, was served. The twenty-one days from the filing of the affidavit had not expired:—Held that, as the creditor might still give a fresh notice, the debtor could not take the affidavit off the file, though the Court had jurisdiction so to order:—Held, a motion is the proper form of application for that purpose.

(a) See a very useful tract on the subject of bonds and other proceedings to be taken under this section, by *Scroope Ayrton*, Esquire; published by *S. Lumley*, 56, Chancery Lane.

1839. *Gibson*. I hereby, on behalf of myself and partners, require immediate payment of the debt of 180*l.*, mentioned in the annexed copy affidavit, together with interest for the same from the 10th instant to the day of payment. Dated this 31st day of December 1838. *Samuel Willis*." On the 11th January following Mr. *Gibson* received the following notice:—"I hereby withdraw the notice dated the 31st day of December last, served on you, for payment of the call of 1*l.* per share in the capital of the Birmingham Patent Horse Shoe and Iron Tip and Heel Company; and I also give you notice, that I shall not proceed either upon the said notice or upon the writ of summons served upon you for the purpose of recovering the amount of the said call. Dated this 10th day of January 1839. *Henry Smythies*, solicitor to Mr. *S. Willis*." It appeared that the above-mentioned affidavit, sworn on the 31st December, was not filed till the 2d January, viz. after service of the foregoing notice.

Mr. *Swanston*:—The reason why the notice was given to withdraw the notice of the 31st December is obvious. The section giving creditors this new remedy (the 1 & 2. Vict. c. 110. s. 8.) enacts, "That if any single creditor, or any two or more creditors being partners, whose debt shall amount to one hundred pounds or upwards, or any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in Her Majesty's Courts of Bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as

The 1 & 2 Vict.
c. 110. s. 8.

aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

The affidavit, not being filed till the 2d of January, would be inoperative on the 31st of December, and of course the notice of it would be also ineffective. The object of the present application is to protect Mr. *Gibson* against the effect of this affidavit; because, by the words of the section, if he does not take the proceedings towards giving the security required by the section, although the party filing the affidavit has abandoned his right, his omission is an act of bankruptcy on the follow-

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ing twenty-second day, of which any other party may avail himself. [Sir George Rose :—If we took it off the file, would that destroy the effect of that clause?] We apprehend it would. It would destroy the first step towards any other party issuing a fiat. No commissioner would proceed on secondary evidence of it; and even if secondary evidence of it were obtainable, the officer of this Court would not treat it as existent, in the teeth of the order of this Court directing it to be taken off the file. It is quite clear he has now no obligation to pay the debt, or give security in manner as required by the statute; and if a fiat were taken out upon it by a third party, although the Court would in all probability supersede it (*a*), still the bankrupt would be put to all the expense, trouble, and inconvenience in the meantime. [Sir John Cross :— Under these circumstances, can this be an act of bankruptcy. A third party taking out a fiat would have to show that the creditor who filed the affidavit was not paid or secured or compounded with to his satisfaction. Where a creditor in this manner withdraws his claim to the remedy given by the statute, can another say the first was not satisfied?] The party has a right to prevent himself being placed in the peril of a fiat. As to this application being by motion rather than petition, it is quite certain that would be considered the proper course in the Court of Chancery. [Sir John Cross :— Not that I object to the form you have adopted; but allow me to remind you that in chancery it would be an application between parties in a cause; here all the creditors of Mr. Gibson, who are in nowise before the Court, may be affected.] The Court acquires its jurisdiction by the filing of the affidavit, and it being an application not strictly speak-

(a) See *ex parte Parker*, post.

ing in any bankruptcy, a motion is the only proper form of procedure.

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of
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Mr. *J. Russell* for Mr. *Willis* the creditor:— No third party could use this as an act of bankruptcy, except by swearing before the commissioners that such an affidavit had been filed, and that notice of such an affidavit having been filed had been given. Here it is plain no such notice has been given. The notice was nugatory, because it ought to have been of an affidavit already *filed*, and not of one *about to be filed*. Therefore no third party can avail himself of it; but it is quite a different thing to take it off the file. We may, now that the affidavit is filed, give the required notice, and issue a fiat thereon. The act only limits the time to two months, which have not yet expired.

The Court stopped further argument for the respondent.

Sir *John Cross* :— For the reasons already assigned, and as it is admitted on both sides, it is quite manifest the notice of the 31st December was altogether irregular, because the affidavit was not then filed. But I see no reason why a fresh notice may not now be given. The words of the section are at first a little ambiguous, but I entertain no doubt that the creditor filing the affidavit has a right to retain it on the file, and give a new notice, and take advantage of the debtor's omission to comply with the requisites of the statute, within the twenty-one days afterwards, as an act of bankruptcy, at any time within the two months. In the meantime no injury can happen to the debtor, and therefore I see no ground to interfere. I am far from thinking we have not jurisdiction in this case; nor need I say whether in every

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 GIBSON.
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 of
 GIBSON.

case the Court would decline to exercise it, and refuse to take an affidavit of this kind off the file. It is sufficient that we think the creditor before us has a right to retain it.

Sir George Rose:—This application is perfectly regular by motion, which indeed is the only proper course of proceeding; nor do I entertain the least doubt as to our jurisdiction; but how far the application can be of use is another point. That which we think justifies us in refusing it is, that, the time not having expired, the creditor has still a right to give a fresh notice, and proceed to a fiat.

Application refused, but without costs.

C. of R.
 Jan. 23,
 1839.

Ex parte LISTER. — In the matter of HADDON.

*A., B., and C., partners;
 A., bankrupt;
 B., bankrupt;
 A., B., and C., bankrupts.*
 Under the separate fiats part of the joint estate had been administered, and a dividend declared. No separate estates or debts. Order to incorporate the separate under the joint fiat, and to stay proceedings thereunder, and liberty to review the choice of assignees. Bankrupts need not be served with petition for this purpose.

THIS was an application to incorporate the proceedings under two separate fiats against two partners, and to impound those fiats, so as to give effect to a joint fiat against the firm of three. One partner only resided in England, and all the property was in the Brazils; a fiat issued against the English partner; then, on the return of another from abroad, a fiat against him; and when the third came here, the petitioners issued a joint fiat against the three. A dividend had been declared, and part of the joint estate administered under the separate fiats; but there were no separate estates or separate debts to deal with under the separate fiats.

Mr. Temple and *Mr. Koe* for the application.

Mr. Swanston and *Mr. Sharpe*, for the separate fiats, suggested that it would be inconvenient to impound the separate fiats, as proceedings for recovery of the joint

estate in the Brazils were still going on under them, and it would be injurious to check those proceedings, or render them inoperative by annulling or impounding them.

But the Court, after observing that the joint estate was much more readily got in under a joint fiat,

Ordered, that the proceedings under all the fiats should be incorporated, and proceedings under the separate fiats should be stayed ; with liberty to the commissioners under the joint fiat to review the choice of assignees, and, if needful, to proceed to a new choice.

Costs out of the estate.

It was objected, that the bankrupts had not been served with this petition.

Per Curiam : — It is not necessary to serve bankrupts with a petition for this purpose.

1839.

Ex parte
LISTER.

In the matter
of
HADDON.

Ex parte HARVEY. — In the matter of EMERY and
RAVENS-CROFT.

C. of R.
Jan. 29,
1839.

DEEDS were deposited with the petitioner by *Emery* and *Ravenscroft*, accompanied by a memorandum dated the 19th Feb. 1835. *Hassell* afterwards came into the firm, and in November 1836 the new firm agreed to adopt the debt, and sign a fresh memorandum. In January 1837 the bankrupts executed a legal mortgage to the petitioners, pursuant to the original agreement, and in March a fiat issued against the bankrupt ; but prior to the execution of the legal mortgage they had committed an act of bankruptcy.

An equitable mortgage, with agreement for legal mortgage. Then an act of bankruptcy ; then a legal mortgage : — Held, legal mortgage invalid, but that equitable mortgage was not merged, but revived.

1839. *Mr. Swanton and Mr. Anderson* :— The legal mortgage being invalidated by the intervention of the intermediate act of bankruptcy, we have a right to resort to our original equitable mortgage, and what we now ask is the usual order.

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Ex parte HARVEY.
 In the matter of
 EMERY
 and another.

Mr. Campbell for the assignees :—The right as equitable mortgagee is gone. The legal mortgage, which was at the time good, except from the effect of the fiat subsequently issuing, merges the equitable mortgage.

Per Curiam :—The legal mortgage, being after notice of a prior act of bankruptcy, is void ; but there is nothing to affect the equitable mortgage. As to the question of merger, there is nothing in it. It is the bankruptcy which makes the legal mortgage void ; the assignees, by setting up the prior act of bankruptcy, come here and make it void ; but doing so, it must have the effect of reviving the equitable mortgage.

Usual order in cases of equitable mortgage.

C. of R.
 Jan. 29,
 1839.

Ex parte COPLESTONE.—In the matter of
 SNELL.

Proof made,
 and then part
 payment of
 debt by surety :
 —Held, credi-
 tor entitled to
 receive divi-
 dends on entire
 proof.

MR. TERRELL applied on behalf of the petitioner, who had proved a debt of 520*l.*, that the assignees might pay him the amount of dividend which had been declared due in respect of his debt.

Mr. Teed for the assignees :—Part of the debt proved has been paid to the petitioner by a surety.

Per Curiam :—The proof having been made before payment by the surety, as it is not alleged that that payment was in discharge of the whole debt, which would give the surety a right to stand in his place, and provided the creditor do not receive more than 20s. in the pound on the whole debt, there is nothing to prevent him from taking the dividends. There is no pretext for withholding them.

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Ex parte
COPLESTONE.
In the matter
of
SNELL.

Ordered as prayed.

Ex parte the Firm of JACKSON, RIDDLE, and Company.—In the matter of WILLIAM SIDNEY WARWICK.

C. of R.
April 22
& 30,
1839.

THIS was a petition praying the rehearing of the case of *ex parte Whitmore* and others in the matter of *Warwick and Clagett*, fully stated and reported, 3 *Mont.* and *Ayrton*, 627, and containing supplementary statements not then before the Court. By the order made on the former hearing, dated 12th July 1838, the proof of the above petitioners against the separate estate of *W. S. Warwick* was directed to be expunged, on the ground that *Jackson, Riddle, and Co.* had accepted the liability of *W. S. Warwick* and *Clagett*, his new partner, in lieu of the liability of *W. S. Warwick* alone, the original debtor.

Semble, the 1 & 2 W. 4. c. 56. s. 32., limiting the time of appeal to the Lord Chancellor, does not prevent this Court re-hearing a question of proof decided by them, although nine months had since elapsed. *Ex parte Whitmore*, 3 *Mont.* & *Ayr.* 627, confirmed on a re-hearing, further evidence being admitted.

The supplemental facts were, that *A. and J. Warwick*, for the purpose of paying to the petitioners the amount of the bills drawn by *A. and J. Warwick* upon the petitioners, and other bills drawn upon *W. S. Warwick*, consigned and remitted to *W. S. Warwick*, both before and after the partnership, large quantities of tobacco and bills; but the consignments and remittances, after the

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 —
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partnership, and the transactions connected therewith, were entered in separate books of *W. S. Warwick*, distinct from the partnership books and transactions. Part of the tobacco was sold by *W. S. Warwick*, and the produce received by him, and other part thereof was pledged with various persons for debts of *W. S. Warwick*, or of him and *Clagett*; and the bills were negotiated partly by *W. S. Warwick* and partly by him and *Clagett*, and the produce received and disposed of for his and their use. Credit was given in the books and accounts of *W. S. Warwick* to *A.* and *J. Warwick* for the tobacco and bills, and he charged them with all bills which had been drawn and accepted by him, *W. S. Warwick*, and by him and his partner for and on account of *A.* and *J. Warwick*.

It appeared by the account current book of *W. S. Warwick*, that three bills for 2,429*l.*, 698*l.* 16*s.* 3*d.*, and 3,167*l.* 12*s.* 10*d.*, drawn by the petitioners upon *Warwick* and *Clagett*, and mentioned in the original petition, were accepted by *Warwick* and *Clagett* for and on account of *W. S. Warwick*, and were charged by him to *A.* and *J. Warwick* in his account with them on the 12th December 1836; and another bill for 1,000*l.*, drawn by the petitioner upon *Warwick* and *Clagett*, was accepted by *Warwick* and *Clagett* for and on account of *W. S. Warwick*, and charged by him to *A.* and *J. Warwick* on the 19th December 1836; and another bill for 3,114*l.* 11*s.* 5*d.*, also drawn by the petitioners upon *Warwick* and *Clagett*, was accepted by them, for and on account of *W. S. Warwick*, and charged by him to *A.* and *J. Warwick* on the 5th January 1837; all those bills being drawn against the consignments and remittances made by *A.* and *J. Warwick* to *W. S. Warwick*, for the purpose of reimbursing the petitioners the advances made by them to *A.* and *J. Warwick*. These and other

like bills being charged as cash in the account against *A. and J. Warwick*, on the 1st February 1837, there appeared a balance of 35,650*l.* 15*s.* 7*d.* due from them to *W. S. Warwick*, but not being ultimately paid, there proved to be a balance of 2,865*l.* 6*s.* 8*d.* in favour of *A. and J. Warwick* against *W. S. Warwick*, assuming the five bills held by the petitioners, amounting to 10,410*l.* 0*s.* 6*d.*, were to be paid by *W. S. Warwick*, or to remain as a charge against his estate; and over and besides which balance *W. S. Warwick* had, at the time of his bankruptcy, a large quantity of tobacco in his possession, which had been consigned to him by *A. and J. Warwick*, as appeared by the account current. All the bills, for 20,000 dollars, 15,000 dollars, and 15,000 dollars, amounting to 50,000 dollars, and mentioned in the original petition, were accepted and paid by the petitioners, and on the acceptance of the bill for 20,000 dollars on the 1st September 1836 it was charged to *W. S. Warwick* on the petitioners books, and subsequently transferred to *A. and J. Warwick*, merely for the purpose of keeping the account under the letter of credit separate and distinct from any other, and the other two bills for 15,000 dollars each were also, for the same reason, charged to the account of *A. and J. Warwick*, and the whole of the transactions connected with the letter of credit, and acceptances of the petitioners in respect thereof, as well as the before-mentioned five bills, were entered in the account of *A. and J. Warwick* in the petitioners books.

(The petition then set forth extracts from the journal and ledger of the petitioners, showing how the transactions connected with the letter of credit and the aforesaid acceptances of the petitioners in respect thereof, as well as the bills subsequently drawn by the petitioners in reimbursement of their acceptances, were entered,

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and from these the petitioners contended that the five bills drawn on *Warwick* and *Clagett* were so drawn merely for reimbursement of payments made by the petitioners, which at the dates of the respective entries were considered and treated as payments made on the credit of *W. S. Warwick*.) The account was continued in manner aforesaid in respect of two several bills of 10,000 dollars each, respectively drawn by *A.* and *J. Warwick*, under the letter of credit, on the 16th January and 3d February 1837, being after the partnership of *Warwick* and *Clagett* was known by *A.* and *J. Warwick* and the petitioners; but which bills were taken up by *A.* and *J. Warwick*, and did not, therefore, form any part of the claim of the petitioners against *W. S. Warwick's* estate.

The petitioners alleged that they never accepted the credit of *Warwick* and *Clagett* in lieu of *W. S. Warwick*, always considering the latter as the debtor for advances made by the petitioners under the letter of credit, and that the account opened on the credit of *W. S. Warwick* was altogether separate and distinct from the joint exchange and premium accounts between the petitioners and *W. S. Warwick*, referred to in the correspondence set out in the original petition, and the transactions therewith connected; and they did not consider the expression, "credits, advices, and instructions," contained in *W. S. Warwick's* letter to the petitioners of the 1st October 1836, and in that of *Warwick* and *Clagett* of the 6th October 1836, as applying to the account opened to the credit of *W. S. Warwick* in favour of *A.* and *J. Warwick*; and they considered that, by the open accounts, referred to in the letter of the petitioners to *Warwick* and *Clagett* of the 15th November 1836, was only meant the joint exchange and premium accounts, and that they had no reference to the account opened on the credit of

W. S. Warwick. The balance of 25,562*l.* 5*s.* 6*d.*, stated, in the letter of *Warwick* and *Clagett* to the petitioners of the 3d November 1836, to be in favour of *W. S. Warwick*, appeared to be so large by reason of bills drawn by the petitioners on *W. S. Warwick* being credited by the petitioners, in their account up to the 1st October 1836, before they were accepted or paid by *W. S. Warwick*, but on the result of the account at the bankruptcy 30,000*l.* was found due to the petitioners. The term "cash" in the last-mentioned letter was used only with reference to the making up of the interest account, and did not imply that *W. S. Warwick* was in a cash advance to the amount of the balance. The five bills upon *Warwick* and *Clagett* were merely drawn by the petitioners as a mode of reimbursement, and for the convenience of *W. S. Warwick*, as he was shortly expected to visit America, and would be absent from London when they became payable, and because, being drawn on him alone, they would not be so current after his entering into partnership. The petitioners had no intention by this to release *W. S. Warwick* from his liability, or to accept *Warwick* and *Clagett* as their debtors in lieu of *W. S. Warwick*, Mr. *Clagett* being an utter stranger to them. The petition went on to deny that *A. and J. Warwick* in any way acknowledged the partnership of *Warwick* and *Clagett* in any transactions between them and *W. S. Warwick*, and so all the bills drawn by *A. and J. Warwick* were upon *W. S. Warwick* alone, although some of them were (without the sanction of *A. and J. Warwick*) accepted by *Warwick* and *Clagett*. All correspondence touching the transactions was addressed to *W. S. Warwick* alone, and all the accounts were entered in the books of *A. and J. Warwick* to the account of *W. S. Warwick* alone. *A. and J. Warwick* never authorized any transfer to *Warwick* and *Clagett* of

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the credit of *W. S. Warwick*, by which *A. and J. Warwick* were authorized to draw on the petitioners; nor did they ever recognize *Warwick* and *Clagett* in any transaction connected with the letters of credit; nor did *A. and J. Warwick* ever assent to the transfer, by *W. S. Warwick*, to *Warwick* and *Clagett*, of any funds or property of *A. and J. Warwick* in the hands of *W. S. Warwick* at the formation of the partnership, and if any took place it was without their authority.

Mr. *J. Russell* and Mr. *Bethell* in support of the petition of rehearing.

Mr. *Swanston*, Mr. *W. Lee*, and Mr. *Reynolds*, for the respondents, took a preliminary objection to the rehearing:—

This is a petition for a rehearing, having for its object to reverse the order of this Court made so long back as the 12th July 1838, by which certain proof made by the present petitioners against the separate estate of *W. S. Warwick* was expunged. The fiat was dated in May 1837, and in May 1838 the proof, since ordered to be expunged, was admitted. The order for expunging was in July 1838, and it was not till April in the present year (1839) that the petition for rehearing was presented. After that distance of time the petition is wholly irregular, the Court having no jurisdiction to entertain it; and if they had jurisdiction, they would not, under the circumstances, exercise it. The words of the section of the act (*a*) giving the power of appeal, are as follow:—“That if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the

(a) 1 & 2 W. 4. c. 56. s. 32.

order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the Lord Chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then and in that case the proof of the debt shall be again heard by the commissioner or subdivision court, and the said evidence shall be then admitted or rejected accordingly."

Not only has a month, but nine months, have passed by since the former decision was made which is now sought to be reheard. But by the section, if one month passes, and no appeal is made to the Chancellor, the former decision becomes final. It was *finally* determined after the lapse of one month from the date of the order of July last; and even this Court has no jurisdiction to rehear its own order; for although the words of the section in terms apply to appeals to the Lord Chancellor only, yet such must be its interpretation, else that section may be considered as virtually repealed. Were it otherwise, how would the matter stand? A party with an order of this Court might, by letting the month pass by, by waiting for another year, or less time, rehear the former order of this Court, and if it should still be adverse to him, might, by appealing to the Lord Chancellor on the second order of this Court, open the whole matter on the first as well as the second order. This would give an extraordinary bonus to laches. There is nothing before the Court to bring the present petitioners within the exception of the statute. The parties were in England at the time of the decision, and for some time subsequent thereto. It may be attempted to throw

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a doubt on this point, by contending that “the whole merits” (within the terms of the act), were not before the Court at the time of the former decision; but if it were so, still it was the parties own laches that kept back the necessary evidence; and they, therefore, cannot take the case out of the section.

Mr. J. Russell and Mr. Bethell, contra.

Sir John Cross :—Before the passing of the 1 & 2 W. 4. the admission or rejection of proof was not a judicial act. The commissioners decision was not a judicial determination, as that tribunal is neither a court of law or equity. It is very difficult to say what effect the act may have had; but I am inclined to think that the former order of this Court cannot be considered as made “*on any appeal* touching any decision in matter of law;” and therefore not within the subsequent words of that section. I also think that that clause was only intended to prevent carrying the matter into any other court, and that it does not extend to the prevention of a rehearing.

Sir George Rose :—The former order was made upon a hearing of the matter which was virtually an appeal from the commissioners judgment; but it is not an appeal, technically speaking. To say the least, it is always called an appeal, and no term is more familiar than that, “no costs are given upon *appeal* from the commissioners.” But, under all circumstances, we had better, I think, rehear this case.

Preliminary objection overruled, and the case stood over for the convenience of parties.

On this day the case was re-argued on the original and supplemental petitions by,

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Mr. *Russell* and Mr. *Bethell* for the petitioners, *Jackson, Riddell*, and Co. With the exception of great stress being laid by the petitioners, as to their intention to substitute *Warwick* and *Clagett* as their debtors for *W. S. Warwick* alone from the mode in which the accounts were kept, the argument on this occasion varied but little from that on the original hearing.

Mr. *Swanston*, Mr. *Lee*, and Mr. *Reynolds*, for the respondents, were not required to argue the case.

Sir *John Cross* :—

Notwithstanding the fresh facts adduced, I consider this case was fully heard and determined upon the former occasion. We were reluctant to rehear it; but as the parties applying for that purpose were foreign merchants, who stated that they had had no opportunity of attending or of adducing all their evidence, we were willing to grant them the indulgence. The new evidence they have brought forward consists of several branches. It was said, that we decided the former case without very distinct evidence to guide us, and the strongest testimony they now offer is, that of the petitioners themselves. I have already intimated that there is extreme danger in receiving the evidence of parties themselves, *ex post facto*, as to their intention in contracts of this nature. I never knew it done, and can hardly bring my mind to think that it ought to be received. But it is said, we ought to receive it, because the evidence on which we formerly decided was not very distinct. I, for one, do not question the veracity

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of these petitioners; but there is always a difficulty in shaping our recollection when, as in the present case, it is biassed by interest. At the time when the proposition of accepting the liability of two instead of one debtor, of drawing bills on *Warwick* and *Clagett* in lieu of *W. S. Warwick*, alone, was first made, we have nothing to induce us to believe that *Jackson* and Co. thought the security of the latter alone was preferable. In fact there is no doubt they at that time thought it better to have the security of the two instead of one alone. The evidence adduced to-day as to intention does not carry the right contended for by these petitioners further than on the former occasion.

Then it is said we had not the evidence of *A. and J. Warwick* before us, as to their reason for drawing on *W. S. Warwick* instead of the firm of *Warwick* and *Clagett*; but I consider that as wholly immaterial, in explanation of the transactions between the petitioners and *W. S. Warwick* and his new firm. Next, the mode of keeping accounts between the petitioners and *Warwick* and *Clagett* of the transactions connected with the letter of credit; but that also I consider equally immaterial. Many cases have been referred to; but this is still a pure question of fact, with which reported cases have nothing to do. *W. S. Warwick*, on the 20th June 1836, writes to *Jackson* and Co., the petitioners, requesting them to give credit to *A. and J. Warwick*, and when done, that they will draw upon him for the amount. Before any payment is made or debt incurred, *Clagett* joins him in partnership; and on the 1st October he writes to the petitioners, informing them of the circumstance, and adds in these words, "I beg that you consider all credits, advices, and instructions now in force from me as extending to the firm of *Warwick* and *Clagett*," thereby recognizing his previous letter, and

transferring the liability of the one to the firm of the two. On the 6th October *Warwick* and *Clagett* wrote a joint letter, requesting the petitioners to accept the liability of the firm in lieu of that of *W. S. Warwick* alone, and in all respects distinctly confirming the requests in the letter of *W. S. Warwick* of the 1st October. On the 15th November *Jackson* and Co., the petitioners, in a letter, addressed, it must be remarked, to the new firm, *Warwick* and *Clagett*, not to *W. S. Warwick* alone, reply, "We shall make up and transfer to your new firm the open accounts in joint exchange transactions, but hope to have our account current, made up to ours, transmitted, before we carry the old account over to your firm." These are terms which require us, as the petitioners think, to look at the mode of keeping the accounts! They in effect say, "they will suspend the carrying over of the general account till the account current is furnished" (and which was then on its way, having been transmitted on the 3d November); but they proceed to draw bills on the firm in respect of the subject of the last letter. It has been said that the Court cannot infer a change of credit merely from the mode in which these bills were drawn. The Court never has done so, but has been guided in its previous and present judgment by other circumstances, especially the letters in question. But we consider that the requisite evidence of such change of credit has certainly been consummated by the bills, otherwise they would have been drawn on *W. S. Warwick* alone. The petitioners never treated him as a separate surety, but were too glad to get the security of both. But it is now said, there was no authority from *A. and J. Warwick* to *Warwick* and *Clagett* to accept the bills. The Court, however, can hardly consider it as unauthorized. When they came to London in that shape, I think *Warwick* and *Clagett*

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were bound to accept them, otherwise they would have subjected themselves to an action. There is, therefore, nothing in this supplemental petition which justifies the parties in appealing from the former decision, and I can only account for the attempt made by supposing it is now discovered that the separate estate of *W. S. Warwick* will pay a better dividend than the joint estate of *Warwick* and *Clagett*; and thence arises a desire to resort back to the original letter of credit of the 20th June 1836. This is altogether an after-thought.

Sir *George Rose* concurred.

Former order confirmed. Petition of rehearing dismissed, with costs.

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When a lease was granted, it passed immediately from the solicitor of the lessor to *R. and Co.*, in order to give them an equitable mortgage upon it, as between *R. and Co.* and the lessee. The lessee became bankrupt, and the creditors assignees sold the lease, and paid off the mortgage with the purchase money. The

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THIS petition stated as follows:— A fiat issued against the bankrupt, dated 2d February 1838. On the 6th March 1838 Mr. *Gibson* was appointed official assignee under it, by Mr. Commissioner *Merivale*; and on the 20th of March the petitioner, being also a creditor, was chosen assignee. Almost the whole of the bankrupt's property consisted of the lease of the Hampshire Hog public house and premises in Berwick Street, Soho, dated 13th September 1837. The lease was received by the solicitors of Messrs. *Reid* and Co., the brewers, from the lessor's solicitors, about the 3d October 1837, and was deposited by the bankrupt with *Reid* and Co. about the 24th October 1837, to secure repayment

The official assignee had nothing to do with the sale, except signing the conveyance. There were no other assets:—Held, the official assignee was not entitled to any per-centage on the fund; but held, that the Court had no jurisdiction on the mere question of the *quantum* of the allowance. The official assignee's accounts, and the commissioner's allowance of per-centage to him, ought to be filed with the proceedings.

of the monies then due and to become due from the bankrupt to *Reid* and Co. for money lent, interest, and goods sold and delivered ; and the bankrupt then signed a written memorandum, acknowledging the deposit to that effect. At that time the bankrupt was indebted to *Reid* and Co. in 647*l.* ; and the lease never was the property of the bankrupt, otherwise than subject to the above charge or lien, which was never paid off or reduced ; and the lease remained in the custody of *Reid* and Co. from the time of granting it till the subsequent sale thereof.

On the 6th April 1838 the petitioner, as assignee, agreed with one *John Wilcox* to sell him the lease for 700*l.*, and the goods, fixtures, and effects for 200*l.*, without incurring the expense of the usual appraisement. The previous consent of *Reid* and Co. to the sale was obtained, and they also agreed to pay 35*l.*, the half year's rent then due, and half the expense of the assignment to *Wilcox*, being satisfied that the petitioner had made a very good bargain.

By indenture, dated 17th April 1838, between Mr. *Gibson*, the official assignee, and the petitioner, on the first part, the bankrupt on the second part, Messrs. *Reid* and Co. of the third part, and *John Wilcox* of the fourth part, after reciting the indenture of lease, and deposit thereof with *Reid* and Co., and that there was then due to *Reid* and Co. 722*l.* 0*s.* 11*d.*, for which *Reid* and Co. then held the lease as security, it witnessed the assignment to *Wilcox* of the lease, discharged of Messrs. *Reid* and Co.'s debt. *Wilcox* paid the 700*l.* to *Reid* and Co. on the 17th April 1838. Mr. *Gibson* objected to execute the assignment, alleging the 700*l.* ought to have passed through his hands, and that by payment thereof in the manner stated he should incur the risk of losing his commission as official assignee ; but he afterwards signed

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it, reserving his claim to commission. Mr. *Gibson* did not in any manner interfere in or take any trouble in negotiating or effecting the sale, and no part of the 700*l.* passed through his hands.

Reid and Co. paid the half year's rent, 35*l.*, to the petitioner's solicitor, and also 13*l.*, being a moiety of the expense of the assignment; and the petitioner's solicitor paid the 35*l.* over to the landlord of the premises. A meeting for determining the official assignee's claim took place before the commissioner, and a written statement of the foregoing facts were, at his request, presented to him; and on the 25th May 1838 the commissioner decided that the official assignee was entitled to commission on the 700*l.* At a subsequent audit and dividend meeting the official assignee produced a memorandum of his account of charges and claims against the estate as official assignee in respect of his receipts and disbursements, and the remuneration to be paid him, which consisted of certain disbursements for postages, &c., and commission at fixed rates on his receipts and payments; and in such account there was a charge of 11*l.* 10*s.* as commission on the 700*l.* paid by *Wilcox* to *Reid* and Co., the whole account inclusive amounting to 23*l.* 5*s.* The commissioner allowed the charges. But although the petitioner had requested this account might be filed with the proceedings, it had never been so filed.

The petition prayed that the official assignee might be declared not entitled to the 11*l.* 10*s.* for commission, but that it might be referred back to the commissioner to review the allowance made by him.

Mr. *Koe* and Mr. *J. Russell* for the petition:—The equitable mortgagees, Messrs. *Reid* and Co., have never come in to prove against the estate as credi-

tors; nor did the assignees require an order for sale, but, using their own discretion, sold the equity of redemption of this property to the purchaser *Wilcox* by private contract. That they acted properly is not denied. The official assignee had nothing to do with the sale, except signing the deed of assignment. The 700*l.* never came to his hands, and never formed, in fact, any part of the bankrupt's estate, the money received passing direct from the purchaser to *Reid* and Co., as mortgagees. [*Per Curiam* :—If it was not the property of the bankrupt, what have we to do with it?] The official assignee, as an officer of this Court, has, however, treated it so, and has deducted the 11*l.* 10*s.*, not out of the 700*l.*, but out of the general estate. That is the very ground of the complaint we make against him. If we were inclined to take technical objections to his demand, this is a distribution of the estate without authority. There is no document of any kind referring to it on the proceedings; no order appears there by which the amount taken by the official assignee has been subtracted from the estate. The proceedings alone can give warrant for such a proceeding; and although we have applied to the official assignee, and to the commissioner, to have the account filed with the proceedings, that has been refused. That this Court has jurisdiction to make this order cannot be doubted, after the dicta in the case of *ex parte Tiplady re Dickenson*. (a) There, indeed, the Court refused to exercise it, because the mere quantum of allowance was submitted to its consideration; but here it is not a question of quantum, but of principle. There, the question was whether the official assignee having properly interfered, the commissioner had allowed him too much; here, whether where he had in no

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(a) 1 *Mont. & Ayr.* 161; 3 *Dea. & Ch.* 570.

1839. way interfered, and had no occasion to interfere, he is entitled to any thing whatever. No part of the 700*l.* passed through his hands, or has come into the bankrupt's estate; and all the official assignee has ever officially heard of the matter is of his being required as a formal party to join in the assignment; but we do not consider even that was necessary. [Sir George Rose :— Even assuming the 700*l.* to have formed part of the bankrupt's estate, why is the official assignee entitled to charge this sum as commission?] He certainly could not, as it never passed through his hands, and he had no trouble or concern with it. [Sir George Rose :— We may take it that the lease was part of the bankrupt's estate at the time of the bankruptcy, subject to the equitable mortgage to *Reid* and Co. Suppose the ordinary course had been resorted to, and the equitable mortgagee had applied for the common order for sale. The order would have directed it, and have gone on to direct, that, the expenses being first paid, the mortgage debt should be paid to the mortgagee, and the surplus only would pass to the assignees. If there were no surplus, which is the case here, how could the official assignee have made a claim, contrary to the order, for commission, against the mortgagee or against the estate? The surplus, if any had arisen, only would pass through the official assignee's hands, and on that only could he claim any thing. In this case the sale took place by private contract, and the same principle will apply. If the official assignee's execution of the assignment had been requisite, and he had refused it, I very much question whether this Court would not have compelled him to execute, and have saddled him with the costs attendant on his refusal. It is quite clear the official assignee could not have claimed a lien on the fund, and, *à fortiori*, he can have none on the general estate. But have you not

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submitted the question to the decision of the commissioner, and so, as it were, bound yourselves?] We say not. We submitted nothing to him as an arbitrator, and only went before him on the matter because we were obliged; therefore we are quite right in applying to this Court. The view your Honour takes is quite correct upon the other point. Suppose there had been no other estate whatever, besides this lease, the official assignee could not claim commission or compensation against the mortgagee, neither can he against the bankrupt or his assignees personally. [Sir George Rose:—In these cases it is only the surplus, after paying off the mortgage and expenses of the sale, that goes to the official assignee.] And the Court will observe that, as it is here, if the mortgage debt be very large, and a commission allowable in respect of it, the entire surplus might be taken from the creditors, and no benefit or service done to them in consideration thereof. A claim like this was never raised before by other official assignees.

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Mr. *Swanston* for the official assignee:—What other official assignees have claimed is not to the point, and by no means establishes that the present is an unjust demand. It must be admitted that the official assignee and commissioner have fallen into an error in not putting evidence on the proceedings, of how and why this sum of 11*l.* 10*s.* has been applied to the respondent's use; but it is impossible for the Court to make a proper order without having the certificate of the commissioner, and thence learning the reasons and principle for the allowance being made. The 57th section of the 1 & 2 Will. 4. c. 56. is as follows: "That it shall be lawful for the commissioner before whom any person shall be adjudged a bankrupt in the said Court of Bank-

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ruptcy, or who shall appoint an official assignee under the power herein-before given for that purpose, to order and allow to be paid out of the bankrupt's estate, to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable." So that the commissioner is empowered to award such sum as he thinks fit for services done to the estate by the official assignee, regard being had to the amount of the estate. Here he may have allowed the sum in dispute for services, and not in the shape of commission on the 700*l.*; and though, in allowing the 1*l.* 10*s.*, he may have had the 700*l.* in view, that cannot vitiate his award. The Court can therefore do nothing without the commissioner's certificate, which we should have furnished but for the extreme hurry with which this case has been brought forward. We claim not out of the 700*l.*, but out of the general estate, for services; and it is well known, on the other side, that the official assignee has devoted almost two entire days, before the magistrates, in the endeavour to procure their assent to the assignment of the licence of the public-house to the purchaser.

Mr. Koe replied.

Sir John Cross :—The official assignee has taken part of the general estate of the bankrupt, to which the creditors object; and, without reference to the question whether the 700*l.* was or was not the estate of the bankrupt, that gives us ample jurisdiction over the matter. This is not like the case of *ex parte Tiplady*, for there the sole question was the quantum of allowance, while here it is a

question of principle, whether he is entitled to any thing. The claim made to this money by the official assignee has always been as commission on the 700*l.*, and not as mere compensation for services. I can find nothing whatever in the act about commission; compensation for services being all that it speaks of. I have no doubt a misconception of rights may have arisen from the general rule laid down to calculate a certain percentage on the assets realized as a remuneration to official assignees. (a) But a calculation of remuneration or commission on the 700*l.* is clearly erroneous. It is not now contended that it was the property of the bankrupt, and yet the commissioner appears to have had regard to that sum in his calculation. But as it is suggested that we have no means of knowing upon what grounds the allowance was made, by reason of the absence of the commissioner's certificate, it will be right to refer it back to him for reconsideration, upon the principle, that if he has thus had regard to the 700*l.* as the property of the bankrupt, the 11*l.* must be disallowed altogether.

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Sir *George Rose* :—I have no doubt that the official assignee is not entitled to any commission or allowance in respect of the 700*l.*; but nevertheless the commissioner may award the same amount for services done to the bankrupts estate, if he think fit, or he may give it in respect of other funds. We have nothing to do with the question of *quantum meruit*. The sole question for us to

(a) General Orders, 12th Jan. 1832.—“That it is recommended to the commissioners to allow the official assignees one per cent. on the monies they respectively receive, and one and a half per cent. more on the monies actually to be divided, subject nevertheless to be increased or diminished in any case under special circumstances to be preferred to the Court of Review.

1839. determine being, whether the commission on the 700*l.* was so be sanctioned.

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It was declared that Mr. *Gibson*, as such official assignee, was not entitled to any charge for commission in respect of the said sum of 700*l.*, the proceeds of the sale of the mortgage property; and the Court ordered that it should be referred back to the commissioner to review the allowance made by him to Mr. *Gibson*, having regard to the said declaration, and if the commissioner thought such allowance too much, then to reduce it; but such allowance to stand if the commissioner were of the contrary opinion. Costs out of the estate.

C. of R. *Ex parte* the Rev. SAMUEL MARINDIN and
May 4, SAMUEL PETER MARINDIN.—In the matter
1839. of SAMUEL PETER MARINDIN.

Court will not act on a certificate of commissioners made in 1828 without referring it back for their review.

THIS was a petition praying a supersedeas under the composition clauses, 6 Geo. 4. c. 16. s. 133, 134. The commission bore date June 1827. In July 1828 the bankrupt offered his creditors a composition of 10*s.* in the pound. On the 9th August 1828 the commissioners under the commission certified that the bankrupt had duly conformed, and passed his last examination; that at a meeting duly convened on the 12th July 1828 the petitioner *Samuel Marindin* offered to pay the creditors the proposed composition, together with the costs of all parties in effecting the composition and supersedeas, on condition that the assignees should, in the event of the creditors at the second meeting agreeing to accept the same, and previous to superseding the commission, convey to the petitioner *Samuel Marindin* all the estate of

the bankrupt, and doing other acts necessary towards the supersedeas, and the assignment to the last-named petitioner. At the second meeting duly held and convened all the creditors attending (above the requisite number and value) agreed to accept the composition. The petition went on to state, that the assignees had not conveyed the estate to the petitioner *Samuel Marindin*, he not considering such formalities requisite in the event of the commission being superseded.

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and another.
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of
MARINDIN.

Mr. *Koe* in support of the petition.

Mr. *Flather*, on behalf of the assignees, consented.

Per Curiam :—This being so old a commission, it will not be proper for us to make the order without first sending it back to the commissioners to review their certificate.

Which being done, the Court on this day directed a supersedeas. July 17.

Ex parte JAMES GOODBODY and others. — In the matter of ANNA CLEMPSON FREEMAN. C. of R.
May 7,
1839.

THIS was a petition complaining of the conduct of the assignees, in reference to the mode in which they had managed the sale of some mortgaged premises, and amongst other things it prayed a resale, and the removal of the assignees. The charge made was, that no *bond fide* sale had taken place, but that a Mr. *Randall* had been employed to bid by the assignees and their solicitor, and was declared the purchaser; that he had found himself duped by the assignees; and that he, and *A. B.* his solicitor, and the clerk of the latter, knew all

Practice as to
viâ voce ex-
aminations.
Not granted
merely where a
witness, having
previously given
information,
refuses to make
affidavit, be-
cause affidavit
as to informa-
tion by *A. B.*
and belieflets in
facts, unless
contradicted by
A. B.

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the circumstances connected with the pretended sale, and had at one time admitted them to the petitioners and their solicitor, and had offered to make affidavit of them; but that *A. B.* the solicitor having since become the solicitor of the bankrupt, he and his clerk now refused to give any evidence in support of the petition.

Mr. *Wood* for the petitioners, under these circumstances, applied for a *vivâ voce* examination.

Sir *John Cross* considered it a fair case for a *vivâ voce* examination, but doubted how far the information received from a third party could be treated as evidence in such a case against the principal respondent.

Sir *George Rose* : —Where both parties agree to a *vivâ voce* examination we direct subpoenas to issue as of course; but where only one side is desirous of it we first hear the case on the affidavits filed, and if we see any necessity for so doing we afterwards direct that a *vivâ voce* examination shall take place. But the difficulty does not press here. You can depose to facts within your own knowledge and that of others; you have been informed (and believe) by another party who refuses to give evidence before the Court; that refusal lets in the affidavit as to information and belief, which is decisive against the other side, unless amply contradicted.

Per Curiam :—Application for *vivâ voce* examination refused.

Ex parte ROBERT MAY, WILLIAM GROSVENOR, CHARLES JONES, SARAH JONES, JOSHUA SEDDON, and other Creditors.—In the matter of HENRY JONES.

C. of R.
May 7,
1839.

THIS was a petition praying that the assignees might be restrained from further prosecution of a suit in chancery, and an inquiry into the circumstances under which it was instituted, whether its further prosecution was beneficial to the bankrupt's estate, and whether an action at law should be defended; and for declaration of a dividend.

The fiat bore date 7th November 1837, being issued on the petition of *Charles Meigh*, who, together with *John Bourne*, was appointed assignee. Mr. *Hugh Brown* was the solicitor to the fiat. The number and value of creditors who proved at the first meeting, and voted in the choice of assignees, were in small proportion to all the bankrupt's creditors, who delayed their proof till the first dividend meeting on the 11th January 1839, when most of the creditors, and the petitioners among them, proved. At a meeting of creditors on the 15th January 1838 authority was given, by part of the creditors present, for the institution of proceedings in equity respecting property to which it was alleged the bankrupt was entitled; but the debts of *all* the creditors who had then proved amounted to 279*l.* only, while the whole debts then and since proved amounted to 2,898*l.* and upwards.

The petition alleged that the authority, if any were given, to file a bill in equity, was of a very general nature, and the questions involved were of a difficult and extraordinary kind, and on which the creditors were wholly incapable of forming any judgment without the advice of counsel, which they had not taken when the

Where a suit is instituted by assignees, the Court will not stop it for the want of the creditors consent, but referred it to commissioners to inquire what funds it would be proper to retain in order to carry it on. Assignees in this case proceed at the peril of costs.

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proceedings were resolved upon; that the bill was filed on the 11th December 1838, and the petitioners had since taken the opinion of counsel, which was unfavourable to the prospect of any benefit resulting to the creditors; that an action was brought against the assignees by the landlord of the bankrupt's premises, which they defended without consulting the wishes of the creditors. Conceiving the steps taken by the assignees to be injudicious, the petitioners requested Mr. *Brown*, the solicitor to the fiat, to call a meeting of creditors upon the subject by advertisement in the Gazette, which he at first agreed to do, but afterwards declined on the part of the assignees. The petitioners however inserted an advertisement, calling a meeting, in the Gazette, and wrote to Mr. *Brown*, requesting the assignees attendance, and begging that they would be prepared to show the advice under which they were acting. Mr. *Brown* refused to pay any attention to this request; but ultimately Mr. *Bourne*, one of the assignees, attended the meeting subsequently held, and, though he did not sign, acquiesced in the consequent resolution of the creditors present against the continuance of the proceedings and defence which the assignees had entered upon in equity and at law. The petitioner further alleged, that the assignees had in their hands 460*l.* applicable to payment of a dividend; but although thereunto requested, they had declined to declare a dividend, in consequence of the pendency of the suit; that the assignees and their solicitor refused to give the petitioners any information as to the advice or opinion under which they acted; and that the petitioners were considerably more than the major part of all the creditors who had proved.

From the affidavits in opposition it appeared that the effect of the suit in chancery would be, if it succeeded, to upset an arrangement which had been entered into

between the bankrupt and his family, and that some of the *named* petitioners were parties defendant in it, and were therefore much interested in its abandonment.

Mr. *Lovai* and Mr. *Koe*, for the petition, stated the facts.

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Mr. *Swanston* and Mr. *S. Sharpe* for the assignees :—
It must not escape the attention of the Court, that some of the parties supporting this petition are deeply interested in stopping the suit in equity, far beyond the mere benefit which the general body of creditors would derive. They are parties defendant to the suit, and personally interested. It has over and over again been established, that the consent of creditors is not an essential ingredient in a suit instituted by assignees in equity. (a) Courts now consider that they cannot stop the proceedings of assignees, regarding them as trustees bound to inquire into the bankrupt's affairs. It is always resolved into a question of costs. If they institute a suit properly, though it fail, still they shall be allowed their costs out of the estate; if they institute it improperly, they take the consequence of their own act, and the Court visits them with costs. They act, therefore, on their own responsibility, and at their own risk. In the present case they had in the first instance the approbation of the creditors who had proved up to the time of the first meeting; but were it otherwise this Court would not interfere. This is very different from the question of the right of assignees to carry on the bankrupt's trade without the consent of creditors.

(a) See *Piercy v. Roberts*, 1 *Myl.* v. *Biggs*, 5 *Sim.* 391; *Stokes v. & K.* 4; *ex parte Evans*, 3 *Dea.* *Deey*, 1 *Beat.* (Irish), 152. And *& Ch.* 470; *Jones v. Yates*, 3 *Y.* see *ex parte Llewellyn*, 1 *Dea.* *& J.* 373; *Casbourne v. Barsham*, 174.
6 *Sim.* 317; over-ruling *Smith*

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There, even the consent of all the creditors is not necessary, though the Court will direct a reference to inquire if such mode of dealing with it is beneficial, even against the dissent of some of the creditors. (a) As to a sale by private contract, the Lord Chancellor, after considerable doubt, has decided, that without the assent of creditors the assignees may apply so as to have the sanction of the Court for their indemnification as officers of Court. If the petitioners had alleged, in the present case, that the original sanction of the creditors had been obtained by fraud or contrivance, it would have been very proper for them to have applied to this Court; but, as it is, this proceeding is not to be justified. [Sir J. Cross:—Do they not show sufficient grounds for our ordering a dividend?] We contend not, inasmuch as we have a right to retain funds sufficient to carry on the suit. From the bill which has been filed, it appears that the bankrupt's wife is entitled to a certain interest, in the event of her surviving her mother, subject to be divested on the happening of certain contingencies; and an account sought for by the bill is necessary, to ascertain the value of such contingent interest.

Mr. *Lovat*, in reply, contended that the petitioners were at least entitled to a reference to inquire whether the continuance of the suit were likely to prove beneficial to the creditors.

Sir *John Cross* : — It seems to me that the petitioners can only take that inquiry at the peril of costs. The petitioners are *prima facie* justified in coming here, and the respondents are equally justified in resisting the application, because they had the sanction of the majority

(a) *Ex parte Mendel*, 4 Dea. & Ch. 725.

of creditors who had proved when the suit was instituted. Since then, however, a large mass of creditors have come in, and the majority who have proved up to the present time think that that sanction ought to be reconsidered, and that the suit should be abandoned. The assignees have not acted quite right in resisting the applications of the petitioners for information as to the chancery proceedings, and the opinion of the counsel who advised them. I see no objection to the inquiry as to the prudence of going on with the suit, if the petitioners are inclined to take it at the hazard of costs, and the assignees do not object.

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Sir *George Rose* : — This Court has no authority to stay the suit, if the assignees choose to go on with it, at the peril of costs. Assignees are not to be dealt with as dry trustees, but must exercise a discretionary power. The proper order will be a reference to inquire how much of the estate ought to be retained for carrying on the suit; not prejudicing the petitioners as to the question of costs improperly incurred by the assignees. The costs of this application of both parties out of the estate; or if the parties can agree, an inquiry if the suit was properly instituted, and the costs to abide the event of the inquiry.

It was ordered, that it should be referred to the commissioner to inquire how much of the estate in the hands of the assignees ought to be reserved, to abide the result of the suit in chancery, to answer the costs of the assignees, without prejudice to any question as to costs improperly incurred by the assignees in prosecution of the suit; and that the costs of the petitioners and respondents of this application be paid out of the estate, to be taxed; and that the commissioner should proceed to declare a dividend.

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June 1,
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Leave, under circumstances, to same petitioning creditor, to issue a second fiat, time for prosecuting the first having expired.

In the matter of KNIBB.

MR. ANDERDON applied, that the petitioning creditor might be at liberty to sue out a second fiat. The former had issued upon an act of bankruptcy committed by non-compliance with the requisites of the 1 & 2 Vict. c. 110. s. 8., the petitioning creditor having sworn and filed the affidavit of debt, and the bankrupt having neglected to give security within twenty-one days. Through inadvertence the two months mentioned in that section of the act had elapsed.

Per Curiam :—Take the order, without burdening the estate with any additional costs, and without prejudice to any other docket struck in the meantime.

C. of R.
June 8 & 12,
1839.

Assignees being ordered by the commissioners to pay the solicitor's bill, that bill, though settled by them, may be taxed, and it is not to be treated as a settled account.

One assignee, stating himself to be also a creditor, may petition for this purpose, though the other assignees object to re-taxation.

Ex parte **LEONARD FOSBROOKE**.—In the matter of **THOMAS FISHER, JOHN FISHER, and MARY SIMMONDS.** (a)

THIS was a petition to tax the solicitor's bill, after payment by one of the assignees, the other assignees opposing such taxation. The bankrupts formerly carried on business as bankers with *Edward Mammatt*, deceased, at Ashby de la Zouch. This petition stated, that the fiat issued in February 1835, on the petition of Sir *John R. B. Cave* and *Edward Calvert*, clerk in the bank of Messrs. *Smith* of Derby, who, with the petitioner, were

(a) See this case on the question of service of the petition, ante p. 176.

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chosen assignees. The assignees employed *W. E. Mousley* as the solicitor under the fiat. The bills of costs, subsequent to the choice of the assignees, amounted together to 2,191*l.* 2*s.* 10*d.*, as follows :

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	£	s.	d.	£	s.	d.
1. General business - - -	369	4	4			
2. General business - - -	59	12	6			
3. As to the sale of the banking business	70	15	9			
4. As to <i>Bourne's</i> business - - -	88	15	4			
5. Actions - - -	445	6	8			
	<hr/>			1,033	14	7
6 a. As to the sale of the <i>Measham</i> estate - - -	-	-	-	730	14	10
6. In the matter of <i>Hood</i> - - -	79	9	0			
7. In the matter of <i>Mathew</i> - - -	84	4	8			
8. As to proceedings <i>v. Lee</i> - - -	53	0	0			
9. As to the <i>Thringston</i> estate - - -	68	0	5			
10. General business - - -	64	15	2			
11. General business - - -	60	1	10			
	<hr/>			409	10	1
12. Further general business - - -	-	-	-	17	3	4
	<hr/>			£ 2,191	2	10
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At a meeting, on the 8th August 1838, the petitioner requested the commissioners to tax the first five bills; but, after observing that the taxing solicitors bills was the most unpleasant part of their duty, and that they hardly considered it to be their duty to tax bills for general business or for conveyancing, declined to tax the same, and passed them in the assignees accounts, when audited by them on the 9th October 1838.

Mr. *Mousley* set off the bill, 6a, in an account of monies received by him for the sale of the estate, before presenting the bill to the assignees; and on the presentment of the account and the bill to the assignees, on the 8th August, the petitioner requested the commissioners to tax the bill, which they did, but, without making any deduction, ordered the assignees to pay the whole. On

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the 9th October the petitioner applied to the commissioners to tax the bills, 6, 7, and 8, when the commissioners told him that if there were improper charges therein, the solicitor and not the assignees would be liable to refund, and refused to tax them. The solicitor, though requested, had neglected to get the bills relating to actions at law and suits properly taxed. On the 8th August, or 8th October, the commissioners taxed the bills, 9, 10, 11, and 12, allowing the entire amount, except 17*s.* 2*d.*, taxed off at the suggestion of the solicitor's own agent, and the commissioners ordered the assignees to pay the bills. (a) The petitioner and the other assignees had in consequence paid the entire amount, 2,191*l.* 2*s.* 10*d.*

The petition then set forth and specified numerous objectionable items, and went on to state that the petitioner was a creditor for 300*l.* and upwards, and that when the bills were paid he was unacquainted with the practice of the taxation of bills in bankruptcy, but that he did not feel satisfied with the bills at the time; and he concurred in signing the checks for payment thereof in consequence of a statement made by one of the commissioners, that, although the bills were allowed by the commissioners, they remained liable to be taxed by any creditor, on application to the Court of Review. (a) The petition prayed that all the bills might be properly taxed.

From the affidavit of Mr. Calvert, in answer to the petition, it appeared the petitioner had had the first five bills since the year 1837, and had had ample opportunity of seeing the accounts, and had signed the checks without opposition.

It also appeared that the petitioner had acquiesced in referring the bills to the revisal of a solicitor in London;

(a) See the clause, *post*, 295.

but this the petitioner explained, by stating that he was not then aware that such bills were subject to taxation.

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Mr. *Swanston* and Mr. *Faber* for the petition:— This petition now comes on for hearing. It has, according to the order of this Court of the 24th May last, been served on the other assignees, who now appear by their counsel to oppose the petition, although they before intimated that they would not interfere in the question. The petition is, therefore, by a single assignee to tax,—the others not joining. The bill now sought to be taxed has indeed been reviewed by the commissioner, but has never been taxed. The petitioner, it is said, has precluded himself from going to taxation by his acquiescence. It is relied on by the other side, that he joined in the check for the amount paid to the solicitor; but it will be seen that he only concurred to that extent, supposing that it was right to pay them in the first instance, and on the understanding that the bills should afterwards be subjected to taxation.

The Court stopped the further argument on behalf of the petitioner, considering the taxation a matter of course.

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Mr. *Bethell* and Mr. *Loftus Wigram* for the respondents:—The bills have long since been paid, and after the time which has elapsed it is too late to disturb that payment. It is a very strong circumstance against this application, that a majority of the number of assignees actually appear to oppose it. Full fifteen months before the settlement at the audit meeting the bills in question were put into the hands of the petitioner, for

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the purpose of examination. The estate of the bankrupts was very large, and much trouble had been taken by the solicitor. The assignees, taking that into consideration, had expressed their entire satisfaction with the conduct and charges of the solicitor, with the exception of the petitioner. An audit meeting is then about to be held, and with a view to that Mr. *Fosbrooke* had examined the bills, having had them fifteen months previously. The amount of the bills being objected to, by agreement they were referred to Mr. *Hamilton* for his opinion as to their reasonableness, and he approved of them. They were subsequently, as we say, sanctioned by the petitioner, and paid, and included in the audit; and the commissioner approved of all the bills except that relative to the mortgage, which he thought ought not to have been included. In *Horlock v. Smith* (a) it was held, that if a client having paid his solicitor's bill of costs without pressure or undue influence, wishes afterwards to have it taxed, he must state in his petition and prove, that the bill contains such grossly improper charges as furnish evidence of fraud. And Lord *Cottenham*, in his judgment says, "It requires a strong case to be made against the solicitor when the client applies for taxation of the bill after payment, and when, after proper time and opportunity for investigating the items which the bill contained, he has thought proper to pay it. The Court will no doubt give relief, after any length of time, if a case of fraud or improper conduct is made out against the solicitor; but it is quite necessary that it should be understood that the client is not, after payment, to have a taxation merely for asking for it." And in the following case of *Waters v. Taylor* (b) an order to tax bills the amount of which had been settled

(a) 2 *Myline & Cr.* 495.

(b) *Id.* 526.

and secured by a deed in A.D. 1819, although the suit was still then pending, the clients affairs having since the year 1822 (when the first solicitor died) been in the hands of another solicitor, and there being no proof of such dealings between the solicitor and client, or of such errors or improper charges in the bill as could amount to evidence of fraud, was refused.

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Sir *George Rose* :—In those cases there was no trust fund, and it is that circumstance which creates a great difference between them and the present case. If the question were now before us, as being merely one between the assignees and the solicitor, it is very probable the former may have bound themselves by what has taken place. The assignees might be liable, as assignees, to make good any deficiency arising by improper payment as between such assignees and their *cestui que* trusts; but looking at the petitioner *quod* assignee only, there is no *cestui que* trust who comes to complain, and the petitioner, merely in the character of assignee has no right to apply.

Sir *John Cross* :—But the petitioner stands here also in the situation of creditor.

Mr. *Bethell* and Mr. *L. Wigram* :—As creditor, he could only come in as creditor to the amount of 20*l.* and upwards under the fourteenth section; and that equity will only be ceded to those who did not acquiesce in the payment of the bill. The section provides “ That the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees

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(who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission ; and all bills of fees or disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law or suit in equity shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same, so settled, shall be paid by the assignees to such solicitor or attorney : provided that any creditor who shall have proved to the amount of 20*l.* or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings, and no more."

The assignees abide in this case by the decision of the commissioners ; and there is no case in which they have been allowed to come in and rip up a settled bill of costs as a matter of course. They must show a very strong case, if they can do it at all, to get such relief. Suppose the ordinary case of an attorney and client, and bills delivered and held for a long time for the purposes of examination ; they afterwards meet, and the client agrees they shall be referred to a third person ; that is done, and afterwards, deliberately, and under full advice, (which this Court must assume the petitioner, being a barrister, to have had,) they are paid, and acquiesced in for three months. Would any one, for a moment, doubt that the client was precluded from re-taxation ? The present is just that case. This is not a case of payment under necessity in order to get the bills or other papers out of the hands of the solicitor. The

petitioner says he is a creditor; but the section does not contemplate the case of a creditor who is also assignee. Assignees might avail themselves of equitable circumstances, such as fraud, and the like, or some *suppressio veri* or *suggestio falsi*. The question of exorbitance, or not, of the items, is to be settled by the commissioners. In *Horlock v. Smith* (a), and *Waters v. Taylor* (a), the Court must remember there was no third party to whom, as in this case, the accounts had been referred, nor any commissioner by whom they had been taxed or reviewed, and therefore the present is a much stronger case. In the former case the application was made within twelve months after payment, and the bills had been delivered only one month before payment. The charges were proved to be unreasonable, and there was an inability to examine into them till the delivery up of all the papers. Here the bills were in the hands of the petitioner long before payment, and being assignee he had every opportunity of examining all the papers to which the bills of costs related. [Sir J. Cross:—Neither of the cases referred to were in bankruptcy.] There is no different rule in bankruptcy from that which exists in causes, except such as this statute gives. The words both of Lord Eldon in *Plenderleath v. Fraser* (b), and of the present Lord Chancellor in *Horlock v. Smith*, lay down one broad and general principle applicable to all cases.

Mr. J. Russell appeared also to oppose the petition on behalf of the two other assignees. The Court having laid it down that the petitioner would have no right here *quâ* assignee alone, he has no *locus standi* whatever. He says he claims taxation as a creditor, but there is no

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(a) *Supra*.

(a) 3 Ves. & B. 175.

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allegation in his petition that he has proved his debt, and it is only those who have proved whom the Court can recognise as creditors.

Mr. *Swanston*, in reply, was stopped by the Court.

Allegation in
 petition that
 petitioner is a
 creditor, as-
 sumes, unless
 denied, that he
 has proved.

Sir *John Cross* : — This is a petition to tax twelve several bills of costs, all of which have been paid by the assignees to the solicitor; the petitioner, who is one of such assignees, having been a party to such payment. He is also a creditor for 300*l.*, and in both characters comes for taxation. It is said by Mr. *Russell*, that he has not in his petition stated that he has proved his debt. But he has stated himself to be a creditor; and, I think, unless that allegation is met by the respondents in their affidavits, we are bound to assume he is a creditor on the proceedings whom the Court will recognize as such. That objection being removed, there are two others remaining for our consideration. First, it is said the petitioner has no *locus standi in curia* upon other grounds; and next, that he is estopped from making this application by his own acts. As to the first objection, it is said that he is an assignee, and cannot make the application because his co-assignees do not concur; and it is insisted he is to be considered and dealt with in his character of assignee only. But the petitioner does not represent himself solely as assignee, nor does he apply solely in that character, for he states himself to be a creditor for 300*l.*, and as such alone, or in the union of his two characters, I am of opinion he has a *locus standi* given him by the statute. The second objection has been put with great ingenuity, upon abstract principles of equity. Hypothetical cases have been advanced, and cases referred to as authorities, which do not touch the question before us. The question turns more upon the

construction of the 6 Geo. 4. c. 16. s. 14. than any thing else. That section provides, that "all bills of fees or disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees, shall be settled by the commissioners, except," &c., "and the same so settled shall be paid by the assignees to such solicitor or attorney." By these words the assignees must pay the bill as settled by the commissioner. They cannot help themselves, but are bound to pay the bill immediately on the commissioners decision; and yet it is said, that if an assignee does pay under these circumstances, he is not entitled, as assignee or as creditor, to have the bills taxed, because it is then too late, unless he can show a case amounting to fraud. The cases cited, and rules of law referred to, have no bearing on the present case. In equity a party may have taxation before payment; and at law a bill must be delivered one month before an action can be brought, in order to afford time for taxation; and if the client does not avail himself of these opportunities for taxing, but pays the bills without resorting to the remedies which the law affords him, he makes the payment in his own wrong, and must take the consequences, which are, that he is bound by such payment unless he can make out fraud. But how does the case stand in bankruptcy? The assignees must pay the bills as soon as the commissioners have settled their amount, or they withhold payment at their own peril. No time is given them to tax the bills. No opportunity arises to tax them before the meeting, because the commissioner may so settle them as to render taxation unnecessary. In the case now before us, the commissioner, at the meeting when the petitioner objected to pay the bills without taxation, and pressed for an opportunity of having them so dealt with, declined to give that opportunity, making use of th

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Bill as to mort-
 gage taxable.

observation, that if the petitioner did not feel satisfied after payment, they remained liable to be taxed by the petitioner or any creditor on application to this Court. The bills have therefore never yet been taxed, although the general right to taxation is as well established as any other which the subject has. I do not look at the items of the bills. I do not say whether they are reasonable or not. It is not our province to decide that question. They may turn out to be perfectly reasonable, and if so, the solicitor will have nothing to complain of. But I am certainly not a little surprised, not only to find the other assignees objecting to join in the petition, but appearing here to oppose the taxation; and I think it would have been better had they remained at least silent, submitting to such order as the Court should make. These bills must therefore be taxed; and be it remembered, that they have not been deliberately paid, but, on the contrary, payment was objected to without taxation, and at most they were paid under the assurance of the commissioner that taxation would not thereby be precluded. As to the bill in respect of the mortgage, it is said not to be taxable because it is made out against the mortgagee; but in effect it is against the bankrupt's estate, which to the extent of it will be lessened thereby. That, I am also of opinion, must be included in the order for taxation.

Sir George Rose.:—It is quite a matter of course that this taxation should take place. The petitioner comes here both as of right and as a matter of duty. He is before us as a creditor, and also as assignee. From the cases cited, no one can entertain a doubt as to the general rule which obtains in causes. And as between the solicitor and assignee, I am not prepared to say that the latter would not be bound, if

it had been a simple voluntary payment, not under circumstances such as this case discloses. But here all the parties are trustees, and we must consider the question with a view to the regulation of the account as to the estate. The solicitor in bankruptcy is as much a trustee as the assignees, and the accounts of both are open to the correction of this Court. An assignee may certainly place himself in a situation to preclude taxation, as between himself and the solicitor; but still the assignee would be liable to make up any deficiency as between him and the estate. There are no such circumstances in the present case, nor has there been any taxation, for it is distinctly sworn that the commissioner absolutely refused to tax some of the bills in question, and that which the others underwent appears to have been merely nominal, at the suggestion of the solicitor's agent. The payment in this case operates as nothing; it was, as it were, a compulsory payment, and not a voluntary act, but made under protest and reservation of the petitioner's rights and under the commissioner's assurance that the bills might afterwards be taxed.

Taxation ordered. Costs reserved.

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of
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Ex parte GEORGE HOLMES.—In the matter of
JOSEPH GARNER.

THE facts stated on this petition were, that prior to the fiat, which issued on the 9th March 1837, the petitioner had accepted, for the accommodation of and as surety for the bankrupt, in order to serve him and assist

who deposited it with the bankers, to secure his floating balance. The bankers proved a debt to a much larger amount, and received a dividend of only 2s. in the pound. *A. B.* subsequently paid his acceptance:—Held, per C. R., *A. B.* had no right to call on the bankers to refund the amount of the 2s. dividend, but had a right to future dividends: But reversed by the Lord Chancellor on appeal, and bankers ordered to refund.

C. of R.
May 25.
L. C.
August 10,
Nov. 4 & 6,
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A. B. gave his
accommodation
acceptance to
the bankrupt,

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him in his business, four several bills of exchange for 183*l.* 11*s.*, 137*l.* 14*s.* 6*d.*, 127*l.* 10*s.*, and 75*l.*, amounting together to 523*l.* 15*s.* 6*d.* These were endorsed by the bankrupt to and were deposited with his bankers, Messrs. *Goodall* and Co., at Coventry, as securities for his floating balance with them. The bankers proved under the fiat for 7,526*l.* 14*s.* 11*d.*, as a debt owing to them by the bankrupt upon the balance of their account, setting forth all the several securities then held by them for the balance, and, amongst them, the four bills in question. On the 10th October 1837 a dividend of two shillings in the pound was declared, and paid to the bankers, and subsequent thereto the petitioner paid the bankers the whole amount of the four bills which were delivered up to him, but they refused to allow the petitioner the amount of the dividend of 2*s.* in the pound calculated on the bills. The bills were not proved specifically as a debt under the fiat, but merely exhibited as securities. On the 13th March 1839 the petitioner applied to prove the 523*l.* 15*s.* 6*d.* under the fiat; but the proof was rejected, and the meeting adjourned in order to give the petitioner time to present his petition. The petition then prayed that the petitioner might be declared entitled, as between him and Messrs. *Goodall* the bankers, to the benefit of and to stand in their place in respect of the said proof made by Messrs. *Goodall* to the extent of 523*l.* 15*s.* 6*d.*, and in respect of the past and future dividends on such proof to that amount, and that Messrs. *Goodall* might be ordered to refund and pay to the petitioner the amount of the dividend of two shillings in the pound, declared as aforesaid, to the extent of the 523*l.* 15*s.* 6*d.*; or, that if necessary, the assignees might be ordered to pay the amount out of future dividends, otherwise to be declared in favour of Messrs. *Goodall*, on the balance of

their proof, after deducting the amount of the bills; and that the assignees might pay the petitioner all subsequent dividends in respect of the 523*l.* 15*s.* 6*d.*; or, if necessary, for liberty to go in and prove the 523*l.* 15*s.* 6*d.*, and receive dividends equal with other creditors, not disturbing former dividends, and that in such case the proof by Messrs. *Goodall* might be reduced less the amount of the petitioner's acceptances.

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of
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Mr. *Swanston* and Mr. *Rogers* for the petitioner :

This question turns upon the construction of the surety clause, 6 Geo. 4. c. 16. s. 52., the words of which are, "That any person who at the issuing of the commission shall be surety or liable for any debt of the bankrupt," "if he shall have paid the debt," "(although he may have paid the same after the commission issued) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof;" and the main feature here is, the right of the surety to call on the creditor over-paid to refund. [Sir *George Rose* :—The right as against the assignees to retain the proof, with a memorandum that the future dividends are payable to the petitioner, is indisputable; but I do not see any further relief that he is entitled to.] [Sir *John Cross* :—On what grounds of law is the claim for refunding made, the whole debt due to the bankers for which they have proved not having been yet paid?] These bills, which form an integral part of the sum proved, have been paid; and that integral part being so paid, the same rights attach in favour of the party paying them, as surety, as if a distinct debt for their amount had been proved, or as though there had been

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no other debt due to Messrs. *Goodall*. The right of the surety under the statute is clear, and it cannot depend on or be in any manner affected by the form in which the proof is made by the principal creditor. (a) In this case Messrs. *Goodall* have already received more than 20*s.*, namely, 22*s.* in the pound, in respect of these bills; 2*s.* in the shape of dividends from the estate, and the full amount of the bills from the petitioner. That they should retain the excess is contrary to every principle of equity,—which this, as a court of equity, is bound to prevent. [Sir *John Cross* :—The bills were deposited by the bankrupt with the bankers, as security for a larger debt, and until the whole amount has been paid to them you cannot claim the refunding of any thing.] [Sir *George Rose* :—When you can arrive at the point of time at which the bankers have been paid more than 20*s.* in the pound on their entire debt, it will be for you to talk of refunding.] With all due submission, that is not so. In *ex parte Rushforth* (b), a surety by bond for advances generally, but under a limited penalty, was held not to be liable beyond the amount of that penalty, and having paid it, was held entitled to a proportion of the dividends, on the proof by the creditor to a greater amount, under the bankruptcy of the principal debtor. Here if he had been party to the deposit of the bills, as security for the entire debt due to the bankers, the amount of the penalty to which he would be liable would be the sums mentioned in the four bills, and no more. Paying them, he is brought within the doctrine of that case, and entitled to a proportion of the dividends received by the bankers.

(a) *Ex parte Brunskill*, 4 Dea. & Ch. 448, per *Erskine*, C. J.; and *ex parte Barratt*, 1 G. & J. 329, per *Leach*, V. C.

(b) 10 Ves. 409.

Again, in *Walker v. Hardman* (a), it was held that the conduct of the principals, debtor and creditor, with respect to a simple money bond entered into by a surety, could not affect the rights and liabilities of an innocent surety, who had not authorized their dealing with the bond in a particular manner. So in this case, the bills could not, as against the petitioner, have been deposited to secure more than the amount for which on the face of them they appear to have been given. [Sir John Cross :—*Ex parte Rushforth* had no retrospective effect, as to ordering the refunding of dividends already received.] Because the circumstances of that case did not require it. That case is much stronger than the present; for in the latter, there is no contract between the bankers and the petitioner that the bills shall be security for more than their amount, 523*l.* 15*s.* 6*d.*;— nothing which, as between them and the petitioner, extends the security to the whole debt. [Sir John Cross :—They might have received 18*s.* in the pound from the estate on their entire proof, and still have come on the petitioner for the whole amount of the bills]. (b) But 2*s.* in the pound having been received as dividend, if the petitioner had tendered only 18*s.* in the pound more to make up the amount of the bills he would have had a right to demand their delivery up to to him. Even admitting that the petitioner was a surety for the whole debt, he can only be surety to the actual amount of his bills, and when they are paid he acquires the right under the statute to stand in the principal creditor's place. But here he was surety for the amount of the bills only, and all that he tacitly agreed to do, and all that the law can presume him to

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(a) 4 *Cl. & Fin.* 258; 11 *Bli.* 229, S. C.

(b) See *Mont. & Ayr. Dig.* 320.

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have contracted for, was the payment of his bills when they became due—nothing more; and having paid those bills, he at once acquires the right to stand in the principal creditor's place, not only in respect of future dividends, but also in respect of the past, over paid to Messrs. *Goodall* and Co.

In *ex parte Brunskill* (a) it was held, that where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid in full, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt.

Mr. *Swann*, for the respondents Messrs. *Goodall* and Co.:—The petitioner was a surety for the entire debt due to Messrs. *Goodall*; he accepted the bills, to say the least, for the benefit of the bankrupt, to enable him to carry on his business; in fact, to use as he thought best. Accordingly, he deposited them with the bankers as security for the entire balance due to them; and though the petitioner may only be liable to pay the bankers the amount of these bills, viz. 523*l.* 15*s.* 6*d.*, still the petitioner was, as regards these bills, a surety for the entire balance due to the bankers. The bills were a part security for the entire balance, and not for any integral part of it, amounting to the precise sum of 523*l.* 15*s.* 6*d.* It was a general deposit to secure the balance due, and the creditor has the right to appropriate the bills to such part of the demand as he pleases. Then is the surety entitled to stand in the place of the creditor, until after the whole debt, for which he is, either in part or in the

(a) 4 *Dea. & Ch.* 442. S. C. 2 *Mont. & Ayr.* 220.

whole, a surety, is discharged? The terms of the act of parliament negative it; for he must have paid the debt, or part of the debt in discharge of the whole. In *Soutten v. Soutten* (a), where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record, it was held, that this did not fall within the 49 Geo. 3. c. 121. s. 8., as payment of part of a debt in discharge of the whole. And in *ex parte Sammon* (b) this Court determined, that if bills amounting to 1,320*l.* be delivered by the drawer to a creditor as a collateral security for a debt of 4,000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the 4,000*l.*, and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer.

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Mr. *Steere*, for the assignees, submitted to the order of the Court.

Mr. *Swanston* in reply:—If the only debt proved by Messrs. *Goodall* and Co. had been that on the amount of the bills, no doubt could arise, and the only difficulty is imposed by their having also proved for an additional sum; though it is hard to understand upon what principle this should create a difficulty. If the bills were the only debt, it must be admitted that the respondents would have received too much, namely, 2*s.* from the estate, and 20*s.* from the petitioner as surety. That they should

(a) 5 *Barn. & Ald.* 852.

(b) 1 *Dea. & Ch.* 564.

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retain the surplus above 20*s.* in the pound is also contrary to justice. What then is to become of it? The bankrupt and his estate can have no title to it, because the latter is bound first to pay 20*s.* in the pound. The respondents cannot retain it, because they have no right beyond 20*s.* in the pound. The petitioner's is therefore the only hand to receive it. If the surety had been party to the deposit of the bills as a security for the whole floating balance, still the bills could not be security for more than the sum expressed to be due on the face of them, and that amount being tendered or paid to the creditor, there ends the surety's liability, and his rights under the 52*d* section immediately attach. But it is contended, that the respondents, having proved for a larger sum, have a right to retain the 2*s.* in the pound till 20*s.* in the pound on the entire debt is paid. Suppose the bills had been paid by the petitioner before the declaration of dividend, could they then have been entitled to 2*s.* in the pound on the 523*l.* 15*s.* 6*d.*? Certainly not; but the petitioner might have received it. The respondents could not have said, "We have still a right to retain our full original proof for the purposes of dividend." The proof was on the 523*l.* 15*s.* 6*d.* represented by the bills, and the difference of the total amount of proof; and every 2*s.* of the dividend was declared upon each distinct pound constituting the debt, and 52*l.* of the total amount of dividend paid must have been declared in respect of the identical 523*l.* 15*s.* 6*d.* represented by the bills. The 523*l.* 15*s.* 6*d.* has been paid by the petitioner as surety, and therefore all the past as well as future dividends upon it belong to him. In *ex parte Barratt* (a) it was held, that where a creditor proved in respect of several bills drawn by the bank-

(a) 1 G. & J. 327.

rupt, and discounted by the creditor proving, and one only of those bills was subsequently wholly paid by the acceptor, so much of the proof as related to that bill must be expunged; and the Vice Chancellor there said, "The law considers each discount transaction as a distinct isolated transaction; and though the form of proof be upon the loan, the proof is in truth upon each bill separately. Upon this principle I must order the 50*l.*" (the amount of the paid acceptance) "to be expunged."

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Sir *John Cross*:—In this case it appears that a debt of 7,526*l.* 14*s.* 11*d.* was due by the bankrupt to Messrs. *Goodall* and Co. at the time of the bankruptcy. This amount they proved, stating at the time they held the four bills in question as a security. They receive a dividend of 2*s.* in the pound upon the entire amount. Afterwards the petitioner pays the four bills in question, of which he was the accommodation acceptor, and the four bills are then handed over to him; whereupon he claims to have a proportionate part of the 2*s.* in the pound dividend refunded to him, and to be entitled to the future dividends on the 523*l.* 15*s.* 6*d.* It has been strongly insisted on behalf of the petitioner, that he was only a surety to the extent of the bills; but I think that as he gave these bills to the bankrupt for his assistance generally, and the latter deposited them with Messrs. *Goodall* as a general security for the floating balance, whatever that might be, the petitioner became a surety for the whole balance, and not a limited part of it; and though his pecuniary liability was limited to the amount of the four bills, the bankers had a right to work out payment to the full extent of the 7,526*l.* 14*s.* 11*d.* by means of them, as long as that debt remained unpaid; and they have not received more than they are entitled to. If there had been no bankruptcy, and the bankers

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 ——— 523*l.* 15*s.* 6*d.*, they would have had a right still to come
Ex parte upon the petitioner for the latter amount, and he could
HOLMES. not have claimed an appropriation of any of the part
 In the matter paid amount towards satisfaction of his liability. The
 of intervention of bankruptcy makes no difference, in my
GARNER. judgment. But the bankers are not now entitled to
 more than the original debt, minus the 523*l.* 15*s.* 6*d.*,
 and therefore their proof must be reduced, and the
 petitioner will be entitled, as surety, to receive the future
 dividends on that amount.

Sir *G. Rose*.:—This is the first case of the kind in which the question of refunding has arisen. (a) The 52d section of the 6 Geo. 4. c. 16. does not create any new right in behalf of the surety, but merely carries out his former rights, which were not otherwise attainable but by petition or by bill in equity. In any circumstances that clause does not give the right now claimed. The petition very fairly states, that these bills were deposited by the bankrupt as a general security for the floating balance due to the respondents, and we find no understanding, even, to limit the security of these bills to anything short of the entire balance ultimately due. It is observable that these bills came to the respondents hands as deposits, and the proper mode of dealing with them would have been to have had them sold as chattels, and the value received to be deducted from the proof, at the time of proof. But, as the facts are, I can see nothing to establish the right to have the dividend refunded. What equity, or by what form of equity, can we work that claim out, as against the third party, the respondents? We can only proceed as against the

(a) As to refunding in general, see *Mont. & Agr.*, Dig. p. 327. s. 7.

assignees, and they can have no resulting right over against the bankers, because they have not, up to the present time, received any thing approaching to 20*s.* in the pound on their entire proof. Then try the question at law as between the petitioner and the respondent. No action for money had and received to the use of the petitioner, or in trover, could lie, because the petitioner could not give evidence that a proof had been made specifically on the 52*3*l. 15*s.* 6*d.*, nor, consequently, a receipt of dividend upon that identical sum. Suppose the respondents had brought an action against the petitioner for the amount of the bills, and a bill in equity were filed by the latter, tendering the 18*s.* in the pound, and stating that the bankers had already received the 2*s.* in the pound by the dividend, and seeking an injunction to restrain the action, the answer to it would have been, "We, the bankers, have a lien on these bills, till we get our entire debt paid." Between this case and that of *ex parte Rushforth* (a) there is this distinction, that the liability of the surety was expressly limited to the amount he subsequently paid, and he had paid the whole debt to the extent of which his security was liable. I am therefore of opinion that no claim exists as to past dividends. With regard to future dividends, the assignees may be considered as trustees for the benefit of the petitioner, and he will be entitled to receive them. In *ex parte Turner* (b), where accommodation bills upon the bankruptcy of the drawer were fully paid by the acceptor to the holder, who, having a further demand under the commission, proved for the whole, including the bills, the Lord Chancellor decided that he might take out of the dividend upon the bills the proportion which he would have received upon the residue of his debt beyond the

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(a) 10 *Ves.* 409.

(b) 3 *Ves.* 245.

1839. bills; if the debt for the bills had been expunged, the rest of the dividend on the bills belonging to the acceptor.

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Ordered, That the petition, as against Messrs. *Goodall* and Co., should be dismissed with costs; and declared, that the petitioner was entitled to receive out of the bankrupt's estate, instead of Messrs. *Goodall* and Co., all future dividends to be declared in respect of the 523*l.* 15*s.* 6*d.*

L. C.
Aug. 10,
1839.

Against this decision the petitioner appealed to the Lord Chancellor.

The SPECIAL CASE.

On the 9th day of March 1837 a fiat was issued against the bankrupt, who was an innkeeper and coach proprietor at Dunchurch in Warwickshire, under which he was declared bankrupt; and *Robert Welchman*, *Benjamin Johnson*, and *John Bray* were duly chosen and appointed assignees.

Previous to the said bankruptcy the petitioner, *George Holmes*, for the accommodation of the said bankrupt, and, in order to serve and assist him in his business, accepted four bills of exchange, amounting in the whole to the sum of 523*l.* 15*s.* 6*d.*, drawn respectively by and made payable to the said bankrupt or order; one, dated November the 30th, 1836, for the sum of 183*l.* 11*s.*, payable three months after date; another, dated December the 30th, 1836, for the sum of 137*l.* 14*s.* 6*d.*, payable three months after date; another, dated February the 7th, 1837, for the sum of 127*l.* 10*s.*, payable three months after date; and the other, dated February the 7th, 1837, for the sum of 75*l.*, payable two months after date. All the said bills of exchange were indorsed by the said bankrupt, and deposited by him, before his bank-

ruptcy, with his bankers, Messrs. *Goodall, Gulson*, and Company, as securities for any floating balance due or which might become due in respect of advances made by them from time to time to and for the bankrupt. The bankrupt had kept a banking account with the said bankers for many years before his bankruptcy, and the course of dealing between them was, that they were accustomed to require him to deposit with them such securities as he could obtain before making him the required advances. Those securities generally consisted of bills of exchange and promissory notes; and upon former occasions the bankrupt had deposited with the said bankers bills of exchange, to which the petitioner was a party, as drawer, acceptor, or indorser, for the like purpose, which were paid at maturity. The said bankers had no notice that the said bills were accommodation bills.

The said bankers proved under the fiat the sum of 7,526*l.* 14*s.* 11*d.*, as a debt owing to them by the said bankrupt, upon the balance of their account with the said bankrupt, as his bankers; and at the time of making such proof they exhibited and set forth securities which were then held by them for the said balance, and amongst such securities so exhibited and set forth by them were the said four several bills of exchange herein-before mentioned.

On the 10th day of October 1837 a dividend of 2*s.* in the pound was declared under the said fiat, and was then paid to the said bankers, on the debt so proved by them as aforesaid, with the full knowledge of the petitioner, before he paid the full amount of the said bills.

That the petitioner afterwards, by various payments, fully paid and satisfied the amount of the said bills to the bankers, as the holders thereof.

That previous to the last payment, amounting to 21*l.* 10*s.*, in the month of January 1839, the petitioner apprised the bankers that he claimed to be entitled to

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stand in their situation to the amount of the said four bills of exchange under the said fiat, and to receive all future dividends on the amount thereof. And he also required the said bankers, upon payment of such balance, to allow to him the dividend of 2*s.* in the pound received by them as aforesaid, or so much of their said debt as equalled the amount of the said bills included in the said proof made by them as herein-before mentioned; but they refused to do so, and claimed to retain the same, there being still a large balance due to them from the bankrupt on account of the debt proved as aforesaid. The said bankers did not prove the said bills of exchange specifically as a debt or debts under the said fiat, but the said bills were merely set forth by them, and exhibited under the said fiat, amongst other securities held by them for the said balance of 7,526*l.* 14*s.* 6*d.*

On the 13th day of March 1839 a meeting for a further dividend was held under the said fiat, and the petitioner attended, claiming to prove for the sum of 523*l.* 15*s.* 6*d.*, as a debt justly and truly owing to him by the said bankrupt under the circumstances before stated, being the amount of the said four bills of exchange, for which the petitioner was liable for the said bankrupt as aforesaid, and as being a debt for which he was liable for said bankrupt at the time of the issuing of the fiat against him; but the commissioners refused to allow the said debt, or any part thereof, to be proved by the petitioner.

On the 2d day of April 1839 a petition was presented by the petitioner to the said Court of Review, and which was afterwards amended by an order, dated the 18th day of April 1839, and which said amended petition, after stating partly to the effect herein-before set forth, prayed, &c. (as already appears in the statement of the original petition).

On the 25th day of May 1839 the said petition came

on to be heard before the judges of the Court of Review, and whereupon, and upon hearing the said petition, &c., the said Court did order that the petition, as against Messrs. *Goodall, Gulson, and Co.*, should be and the same was thereby dismissed; and that the petitioner should pay to Messrs. *Goodall, Gulson, and Co.*, or to their solicitor or agent as therein mentioned, their costs of and occasioned by that application, such costs to be taxed as therein mentioned, if the parties differed about the same; and the said Court thought fit to declare that the petitioner was entitled to receive, out of the estate of the bankrupt, instead of the said Messrs. *Goodall, Gulson, and Co.*, all future dividends declared under the fiat in respect of the said sum of 52*l.* 15*s.* 6*d.*, the amount of the petitioner's acceptances in the petition mentioned, and included in the proof so made by Messrs. *Goodall, Gulson, and Co.* against the estate of the bankrupt, as also mentioned in the petition. And it was ordered, that the costs of the petitioner and of the assignees, to be taxed as therein mentioned, should be paid out of the estate of the bankrupt; by which order the petitioner is aggrieved, so far as the said order deprives him of a dividend under the said fiat; and the dismissal of the said petition against the said Messrs. *Goodall, Gulson, and Co.*, with costs, to be paid by the said petitioner.

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Mr. *Swanston* and Mr. *Rogers*, for the appeal, cited further the case of *Martin v. Brecknell* (a), in which it was held, that the obligee of a bond given by principal and surety, conditioned for payment of money by instalments, who has proved under a commission against the principal the whole debt, and received a dividend thereon of 2*s.* 7*d.* in the pound, may recover against the surety an instalment due, making a deduction of 2*s.* 7*d.*

(a) 2 *M. & Sel.* 59.

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in the pound on the amount of such instalment, and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due. In *Bardwell v. Lydall* (a), where the defendants guaranteed the plaintiffs against debts to be contracted by *L. M.* to the extent of 400*l.*, and he became indebted to the plaintiffs to the amount of 625*l.*, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, leaving due to the plaintiffs out of their whole claim, 356*l.*; defendants being sued for that sum on their guarantee,—Held, that they were entitled to deduct from it 171*l.* 13*s.* 4*d.*, the amount of the dividend of 8*s.* 7*d.* in the pound upon the 400*l.*

Mr. *Swann* for Messrs. *Goodall* and Co.

Mr. *Steere* for the assignees.

Nov. 4. The arguments were resumed on the 4th November, and the case stood over for judgment.

JUDGMENT.

Nov. 6. The LORD CHANCELLOR:—

Holmes, for the accommodation of the bankrupt, accepted bills amounting to 523*l.* 15*s.* 6*d.*, which were indorsed by the bankrupt, and by him deposited with his bankers, as a security for any floating balance. These being mere accommodation bills, *Holmes*, as between himself and the bankrupt, was a mere surety for the 523*l.* 15*s.* 6*d.* The bankers advanced upwards of 2,000*l.* to the bankrupt, and proved the whole of such debt against his estate, and received a dividend of 2*s.* in the pound upon the whole of the debt. No part of the proof was upon the bills, but they were exhibited as

(a) 7 *Bing.* 489.

securities. *Holmes* afterwards paid the whole of the 523*l.* 15*s.* 6*d.* to the bankers, and by the order of the Court of Review he has been declared entitled to receive all future dividends upon the 523*l.* 15*s.* 6*d.*, part of the debt proved by the bankers; but the Court refused to give to him the dividend of 2*s.* in the pound upon that sum already received, and dismissed the petition, with costs, as against the bankers.

This order assumes, that *Holmes* was a surety for the bankrupt to the bankers for 523*l.* 15*s.* 6*d.* due to them, and that he paid such sum to them after the creditor had proved that sum against the bankrupt's estate, in which case the 52*d* section of the 6 Geo. 4. c. 16. declares, that such surety shall be entitled to stand in the place of such creditor *as to the dividends*, and all other rights under the commission which such creditor possessed or would be entitled to in respect of such proof. Why then is the dividend of 2*s.* in the pound upon the sum of 523*l.* 15*s.* 6*d.* not to be received by *Holmes*? Is it not a dividend as to which the act declares that the surety shall stand in the place of the creditor? Was not the title to it a right under the commission which the creditor possessed in respect of such proof? Upon what principle is the surety entitled to the future and not to the past dividends? It was contended that the security not being for any specific part of the debt, but for a floating balance, the creditor was entitled to receive all the dividends upon the whole debt, and to come upon the surety for the difference, or so much as might be necessary to pay the creditor in full, upon the principle that the creditor receiving money would be entitled to appropriate it to the part of the debt which is not secured. But the order negatives the application of any such rule, by giving to the surety all future dividends upon the 523*l.* 15*s.* 6*d.*; and that principle of appropriation can have no application to a case in which

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the payment is specifically on account of the debt secured. And it is clear that the payment of 2*s.* in the pound upon the whole debt, including the 523*l.* 15*s.* 6*d.*, was a payment specifically of 2*s.* in every pound of the 523*l.* 15*s.* 6*d.*; and if the creditor, who has received the whole 523*l.* 15*s.* 6*d.* from the surety, also retains the 2*s.* received as dividend upon that sum, he will be paid above 50*l.* beyond the amount of the debt secured. That the dividend so received cannot be treated as a payment generally on account of the whole debt, but must be considered as a payment of part of each pound of the debt, is clear from the form in which it is made; and the law directing the payment, and several decisions, have held that such payments are to be so considered, particularly the case of *Bardwell v. Lydall*, 7 *Bing.* 489. The earlier cases of *Paley v. Field*, 12 *Ves.* 435, and *ex parte Rushworth*, 10 *Ves.* 409, proceeded upon a similar principle, and which is also recognized in *Martin v. Bricknell*, 2 *M. & S.* 39, and *ex parte Brook*, 2 *Rose*, 334. If, then, the dividend received upon 523*l.* 15*s.* 6*d.* is to be attributed to that portion of the debt which was secured by the bill of *Holmes*, it is immaterial that the bankers had larger or other demands against the bankrupt; and if there had been no other debt but 523*l.* 15*s.* 6*d.* due to the bankers, the right of *Holmes*, paying the debt, to receive all the dividends upon such debt against the estate of the bankrupts, would not be questioned. I am therefore of opinion that the order in this case ought to have been, as it was in *ex parte Brooks*, for the creditor to repay to the surety the dividend he had received upon the sum paid by the surety. That part of the order dismissing the petition as against the bankers, with costs, must also be reversed.

I am perfectly at a loss to understand the principle upon which that latter portion of the order proceeded,

because, as the Court made the order adverse to the bankers in respect of the future dividends, it is quite clear the petition against them was necessary, though the other parts of the prayer of the petition were rejected.

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Order of the Court of Review reversed. Costs
of the assignees out of the estate.

Ex parte JOSEPH RHODES.—In the matter of
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C. of R.
June 11,
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THIS was a petition praying a supersedeas, that the advertisement might be stayed, and that the petitioning creditors might pay the costs.

The petition stated, viz. That on the 20th or 22d April last (1839) an affidavit was filed as follows: "In the Court of Bankruptcy, *Lancelot Gibson*, of Manchester," &c. "maketh oath and saith, that *Joseph Rhodes*, of," &c. "dealer and chapman, is justly and truly indebted to this deponent, and *Joseph Taylor* and *William Taylor*, this deponent's late partners in trade, in the sum of 100*l.* and upwards upon several bills of exchange drawn by this deponent and his said late part-

The affidavit (dated 22d April 1839) under the Abolition of Arrest Act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.* and upwards," on bills of exchange, as due to *A.* the "deponent, and *B.* and *C.* his late partners." The notice and requisition to pay (dated the 24th April) was in respect of a debt of 3,612*l.*,

but intended as the same and the real debt, and was signed by *A.* for *B.* and *C.* and himself. On the 24th April *A.* filed another affidavit, swearing the debt to be 3,612*l.* "upon bills of exchange;" and on the 2d May, "*A.* and *B.*, for themselves and *C.*," gave a corresponding notice. The commissioner approved a bond for 200*l.* as security under the first affidavit, although he had notice that the real debt was the 3,612*l.* On the 3d June *A.*, *B.*, and *C.* issued a fiat on the alleged act of bankruptcy, by not having given security under the second affidavit and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the 8th section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat; and the petitioning creditor's affidavit, on striking the docket, stated the debt to be due "for goods sold and delivered:"—Held, these were not sufficient objections to warrant the staying the advertisement in the Gazette. And upon the question of supersedeas, *quære*, whether these, or any of them, are sufficient grounds for superseding. Per Sir G. Rose:—The proof of the act of bankruptcy by the solicitor to the fiat is sufficiently bad to induce the Court to send the question to be tried by action at law.

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ners upon and accepted by the said *Joseph Rhodes*, and which said bills so accepted have become due, and been returned dishonoured and unpaid. And this deponent further saith, that the said *Joseph Rhodes*, at the time of the contracting the said debt of 100*l.* and upwards, was and still is, as this deponent verily believes, a trader within the meaning of the laws now in force concerning bankrupts." On the said 22d April the petitioner was served by *Richard Redfern*, of Oldham, solicitor, with a copy of the affidavit above set forth, and with a notice thereunto annexed, of which the following is a copy: "We do hereby require and demand of you immediate payment of the debt sworn and deposed to in the affidavit a copy whereof is hereunto annexed, and which affidavit is filed in her Majesty's Court of Bankruptcy, such debt being due to us, and amounting to the sum of 3,612*l.* 15*s.* 10*d.* Dated the 22d day of April 1839. To Mr. *Joseph Rhodes*." The notice purported to be signed as follows; viz. "For *Joseph Taylor*, *William Taylor*, and self, *Lancelot Gibson*."

1 & 2 Vict.
 c. 110. s. 8.

That the petitioner did, as required by the act of parliament (the abolition of arrest for debt act, 1 & 2 Vict. c. 110. s. 8.) in that behalf, within twenty-one days after the service of the affidavit and notice on him as aforesaid, enter into a bond in the penal sum of 200*l.* (being the amount fixed by the commissioner), with two sufficient sureties, who were approved of by Mr. Commissioner *Williams*, to pay such sum or sums as should be recovered in any action or actions then brought or which should be thereafter brought for the recovery of the debt alleged to be due by the said affidavit and notice, together with such costs as should be given in the same action or actions, or to tender the petitioner to the custody of the gaoler of the court in which such action or actions was

or were or should or might be brought, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof should direct, after judgment should have been recovered in such action or actions.

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That on the 14th May last the bond was, on behalf of the petitioner, delivered and left with Mr. *Spinks*, the agent for and on behalf of the said *Lancelot Gibson* and *J. and W. Taylor*, in this matter.

Approval of
secretary by
commissioner.

That on the 24th April another affidavit was filed in this Court as follows: "In the Court of Bankruptcy. *Lancelot Gibson*, of," &c. "maketh oath and saith, that *Joseph Rhodes*, of," &c. "is justly and truly indebted to this deponent, and *Joseph Taylor* and *William Taylor*, this deponent's late copartners in trade, in the sum of 3,612*l.* 5*s.* 10*d.*, upon several bills of exchange drawn by this deponent and his late partners upon and accepted by the said *Joseph Rhodes*, and which said bills so accepted have become due, and been returned dishonoured and unpaid; and this deponent saith, that the said *J. Rhodes*, at the time of contracting the said debt of 3,612*l.* 5*s.* 10*d.*, was and still is, as this deponent verily believes, a trader within the meaning of the laws now in force respecting bankrupts."

The second
affidavit.

That on the 2d May the petitioner was served with a copy of the affidavit, and a notice according therewith, and similar to the former, but dated the 29th April, and signed, "For *Joseph Taylor* and Selves. *William Taylor*. *Lancelot Gibson*."

The second
notice.

That *Gibson* and his late partners were not in partnership at the time of making the affidavits and giving the notices. A fiat issued on the 3d June, on the petition of *Gibson* and the two *Taylors*, upon an affidavit of debt by *Lancelot Gibson* that the petitioner was indebted to *Gibson* and his late partners in the sum of

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drawn by the deponent and his said late partners
upon and accepted by the petitioner, which had
become due, and had been returned dishonoured and
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That the debt mentioned in all the said affidavits and notices before mentioned were one and the same debt, and not divers or several debts.

That the petitioner being advised that the second affidavit and notice were irregular or improper, and that such second affidavit on the same debt ought not to be or could not properly be filed, and also that the said bond so given by the petitioner after the second affidavit was filed and the second notice given was a compliance with the requisition of the said statute, if applicable to the case, the petitioner did not take any steps to give any further security thereon, but moved this Court to take the said second affidavit off the file of this honourable Court, but which application this Court was pleased to refuse. (a)

That the petitioner had not committed any act of bankruptcy, unless the not giving further security on the second affidavit and notice was in law an act of bankruptcy, which the petitioner was advised it was not, and more especially under the circumstances that the second notice, though purporting to be signed by *William Taylor* for *Joseph Taylor*, and himself, was not in fact so signed, and the words “For *Joseph Taylor* and self were introduced by some person into the said notice after the same had been signed by *William Taylor* with his own name only, and without any authority from him for that purpose.”

(a) See the report of the case on that occasion, *ante*, p. 149, under the name of *ex parte Rose* in the matter of *Rose*.

That the debt mentioned in the said notices, and by the said three several affidavits stated to be due to *Gibson* and his said late partners in trade, was not at the time of swearing the same or any of them due or owing to those parties or any of them from the petitioner. But the debt, if any, founded on the bills of exchange mentioned in the affidavits, had been, at and prior to the swearing thereof, and at and prior to the time of the bills falling due, assigned over by *Gibson* and partners to trustees for the Manchester and Liverpool District Banking Company, or some other persons, and the bills had been endorsed away and delivered over by the drawers thereof, and were then in the hands of, and the money secured thereby was due, and owing to, the said banking company, or some other persons, as endorsers thereof.

That the petitioner was also advised and submitted that the two first-mentioned affidavits and the notices thereon, were not in conformity with the act of parliament under which the affidavits were filed, and that the same did not comply with and were not expressed in the terms of the said act, and that the act required the deponents to state the debts to be justly due and owing to them.

That the affidavits and notices were not made or given by the parties required by the act, the same requiring all the creditors, and not one of several partners, and more especially not one of several persons, not being in partnership, to whom a debt was due, to make the affidavit or give the notice.

That the fiat was issued for sinister purposes, and not as the *bona fide* fiat of the petitioning creditors.

That the bills of exchange before mentioned were accepted by the petitioner as a guarantee to *Gibson* and his late partners, upon their consigning certain

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goods to *James Rhodes*, of Montreal, for sale on their behalf.

That the goods, and the balance of account and debt in respect thereof had been, at the date of the affidavits and notices, assigned over by *Gibson* and his said late partners to some trustees for the said banking company, or some other person, and did not then or since belong to the petitioning creditors.

That there was no sufficient petitioning creditors debt.

That the petitioner was solvent, and with assets able to pay 20s. in the pound and to leave a considerable surplus; and that the advertisement of the fiat would be ruinously injurious to the petitioner.

Mr. Swanston and *Mr. Rogers*, for the petitioner, now moved that the insertion of the advertisement in the Gazette might be stayed. This is a question turning altogether on the construction of the 1 & 2 Vict. c. 110. s. 8. (a) The foundation of the prayer for a

(a) " And be it enacted, that if any single creditor, or any two or more creditors being partners, whose debt shall amount to one hundred pounds or upwards, or any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's courts of bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with

supersedeas rests mainly on there being no proveable debt, because we say the bills in which the debt originated were long since endorsed away by the petitioning creditors, and were in the hands of third parties when the docket was struck; and even supposing it turned out to be otherwise, the affidavits and notices (without going into the question as to the validity of the second) were not made or given in manner required by the act. The act requires that "a single creditor, or any two or more creditors, being partners," "or any two creditors," "or any three or more creditors," shall file an affidavit that such and such a debt "is or are justly due to him or them," "and shall cause him" (the debtor) "to be served personally with a copy" of the affidavit, and with a notice in writing "requiring payment," &c. In the first place, Mr. *Gibson* in his affidavit states that which he claims to be a debt, not due to himself alone,—not being due to himself and partners, but to him and *A. B.* and *C. D.* "his *late* partners." If they had still been partners together, *Joseph* and *William Taylor* must, we submit, have joined in the affidavit and notice, according to the words of the act; and if the partnership be put

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such two sufficient sureties as a or within such time and in such commissioner of the Court of manner as the said court or any Bankruptcy shall approve of, to judge thereof shall direct, after pay such sum or sums as shall judgment shall have been recovered in any action or recovered in such action; every such actions which shall have been trader shall be deemed to have brought or shall thereafter be committed an act of bankruptcy brought for the recovery of the on the twenty-second day after same, together with such costs service of such affidavit or affidavits and notice, provided a fiat as shall be given in the same, or in bankruptcy shall issue against to render himself to the custody such trader within two calendar of the gaoler of the court in months from the filing of such which such action shall have affidavit or affidavits, but not been or may be brought according to the practice of such court, otherwise."

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out of sight altogether, and the debt be treated as one due to "three or more," *à fortiori* creditors otherwise disconnected must join in this process. The words are conditional; "that if," say, "any two or more creditors" "shall file an affidavit or affidavits" (clearly indicating all must swear either jointly or separately,) "and shall cause him" (the debtor) "to be served with a copy and notice," &c., such and such things shall happen. From this it is evident the entire party claiming the debt must give the notice. If the form of proceeding pointed out by the act be not observed as a condition precedent, the benefit offered to the party cannot be acquired. The first affidavit and notice, and the second affidavit, were signed by Mr. *Gibson* only, and the second notice, even allowing the signature to be genuine in other respects, was not signed by *Joseph Taylor*. Then again the words of the act require that the creditor shall swear that the debt is "justly due" to him; and when a statute prescribes any forms of proceeding it must be strictly followed. But Mr. *Gibson* has departed altogether from the form prescribed, and introduced only the words that the petitioner is "justly and truly indebted." [Sir *J. Cross*:—The statute does not prescribe any particular form of words, and the expression used in this affidavit is equivalent to what the statute requires.] Then, again, the alleged act of bankruptcy is proved by Mr. *Redfern*, who is the solicitor to the fiat. Being entitled to his costs against the first estate which comes to hand, he is a witness interested in maintaining the fiat, and therefore incompetent to prove any of the requisites to support it. [Sir *G. Rose*:—I see the petitioning creditors affidavit of debt on striking the docket states the petitioner to be indebted in 100*l.* and upwards for goods sold and delivered. How is this?] That then is another defect; for the affidavit of debt under the statute on the

proceedings states the debt to be due on bills of exchange. It is a different debt, therefore, altogether.

Mr. *Temple* and Mr. *Bagshaw*, for the petitioning creditors, were not called upon to argue *contrâ*.

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Sir *John Cross*:—This is a petition to supersede, and seeking to stay the advertisement in the Gazette. The petitioner does not, on the present occasion, press the former part of his prayer, but merely raises the question, whether the insertion of the advertisement ought to be stayed,—whether it ought *reasonably* to be stayed. Had any probable cause for our ultimately awarding the supersedeas been shown, I, for one, should not have hesitated in granting that which is now sought; but no such probable cause has been shown. The strongest fact adduced is, that it does not appear but that the original debt has been paid, and thus the act of bankruptcy under the statute is questioned; but even assuming that to be so, still it is open to the respondents to prove another and better act of bankruptcy. I therefore see no reason for staying the advertisement.

Sir *G. Rose*:—There is no proper act of bankruptcy on the proceedings; and if we were now on the question of supersedeas I should advise the parties to rely on the objection of the solicitor's interest. (a) But that defect may be remedied, and therefore there is no probable cause for superseding the fiat sufficient to induce us to stay the advertisement. We must reserve the petition, and all objections, till the question of supersedeas comes to be argued. As to the costs, the respondents cannot

(a) See *ex parte Hills, Mont. & Mac.* 272; *ex parte Law, Mont. & Ayr.*, Digest, 107; *Rez v. Bullock*, 1 Taunt. 75.

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But it was ultimately ordered, That the respondents should have their costs out of the estate, without prejudice to the question by whom they should ultimately be borne. Further hearing of the petition to be adjourned, with liberty to apply.

C. of R. The petition now came on to be heard on the question
July 16, 17, of supersedeas.
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Mr. *Swanston* and Mr. *Rogers*:—There can be but one affidavit and one notice as to one debt. The creditor swore his first affidavit, and gave notice of it, and in respect of that we gave security to the satisfaction of the commissioner. The act of bankruptcy being proved by the solicitor is fatal to this fiat, because he is an interested witness in regard to his primary right to costs. [Sir *J. Cross*:—By the 6 Geo. 4. c. 16. s. 15. the petitioning creditor is the party liable to pay the solicitor's bill, and I know of no case in which a solicitor, as such, has been held to be an incompetent witness. In common law a solicitor's evidence is received every day, and yet he has a lien.] [Sir *G. Rose*:—I entertain no doubt as to his incompetency, though I should be loath to supersede on that ground. (a) But if the bankrupt says he intends to raise that point at law, it is at least a reason why he should not be forced on here by the threat of dismissal of his petition.] [Sir *J. Cross*:—I cannot agree that it is competent to the bankrupt to object to the evidence of the act of bankruptcy taken before the commissioners.] We next say there is no

(a) See *ante*, 328.

evidence that the bills which constitute the debt were in the hands of the petitioning creditors at the time of striking the docket. The assignor of a debt can in no case prove a debt; neither can the assignee alone; both must join. But here the debt, being on bills which were endorsed away, is in nowise proveable by the former holders until payment by them. Then we object that the form of the act of parliament has been departed from in the affidavit of debt. The notice, as by one of several partners, when the partnership was dissolved, we also say was clearly wrong. They are no longer partners, and therefore can only be regarded as parties jointly interested, and must all join in the affidavit.

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Mr. Temple, Mr. Bagshawe, and Mr. Swann, for the petitioning creditor:—The debt was a partnership debt, and any one partner might sue upon it, or discharge the debtor by a release. [Sir John Cross:—Suing for a debt is within the general scope of authority given to one of several partners; but one partner cannot file a bill or sue out a fiat by himself alone.] The bond was given on the first affidavit only, and was insufficient to secure the real debt, the amount of the bond being for 200*l.* only. But we say that even that security was not sufficient, for it was not stamped when it was accepted by the commissioner. The legislature intended that the creditor should be in a situation to proceed upon the bond within the twenty-one days mentioned in the act. It was not stamped, and so not delivered within the twenty-one days, and therefore no security whatever was entered into within the words of the act. [Sir John Cross:—How in the nature of things could you recover upon the bond in twenty-one days? Surely the legislature never contemplated such an impossibility. The bond was stamped subsequently, and that relates back to the ori-

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larly signed by the Lord Chancellor, and issued on the day on which the same purported to bear date, and therefore within the period limited by the statute in that case made and provided.

That the petitioner had committed no act of bankruptcy, unless the signing the said declaration of insolvency were held to be an act of bankruptcy.

The petition prayed a supersedeas at the cost of the petitioning creditor.

Mr. *Philips*, the petitioner's solicitor, by an affidavit, amongst other things, swore that on Monday the 6th day of May instant *Henry Rowe* called upon the deponent about twelve o'clock at noon, and informed him that he had learnt, at the office of the secretary of bankrupts, that the fiat in this matter had not been issued from the office of the said secretary of bankrupts, and that it appeared that it had not been signed on the 4th day of May instant, the day it was stated to bear date; and the deponent, about a quarter past one o'clock in the afternoon of the 6th day of May, accompanied by *Henry Rowe*, went to the secretary of bankrupts office to make inquiry respecting the said fiat, when he was informed by a clerk in the office that the fiat had just been brought from the Lord Chancellor, having been signed only about an hour before, but that the fiat was dated on the Saturday preceding; and the reason assigned by the clerk for not getting the fiat signed by the Lord Chancellor on the same day that the docket was struck was, that he did not like to trouble the Lord Chancellor to sign twice in one day; and understood the clerk to say, that the person who attended to strike the docket fully understood that the fiat would not be signed till the 6th day of May, and was satisfied that the same should be signed on that day, although it was stated

that Saturday was the last day; and the clerk took up a folded parchment which was then lying on the desk before him, and which deponent believed was the said fiat, and observed to deponent that it "had not gone yet," or words to that effect; and having doubts of the validity of the fiat, deponent requested the clerk to take a particular note of the time the fiat was signed, as it might be necessary to take an objection to the validity of the fiat, and the clerk promised to take a note of the time accordingly.

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Mr. *Swanston*, in support of the petition:—

This fiat, founded on the declaration of insolvency which was made under the circumstances detailed in the petition, must be superseded, as taken out in breach of good faith; but the main objection to it is, that it was not sued out within the two months mentioned in the act. The words of 6 Geo. 4. c. 16. s. 6. are, "That if any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the said secretary of bankrupts or his deputy shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed; but no commission shall issue thereupon unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed; and no

The 6 G. 4.
c. 16. s. 6.

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docket shall be struck upon such act of bankruptcy before the expiration of four days next after insertion of such advertisement, in case such commission is to be executed in London, or before the expiration of eight days next after such insertion, in case such commission is to be executed in the country; and the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed."

The declaration of insolvency was dated on the 4th March; on the 5th it was inserted in the Gazette; and although the fiat bears date on the 4th May, it was not in fact signed by the Lord Chancellor, nor delivered out by the officer, till the 6th May; so that the two months prescribed by the statute had then expired. Until the delivering it out, or at all events until the fixing the signature of the Lord Chancellor to the fiat was performed, it was an inchoate document, and could not be said to be "sued out" within the meaning of the statute. All that the petitioning creditor had done within the two months amounted to *an application* for a fiat. If the statute were to be satisfied with that alone, the expression "sued for," instead of "sued out," or something equivalent to it, would have been used. There is a wide distinction between "suing for" and "suing out," and yet the respondent in this case has to contend they are identical. However, striking a docket is not suing out a fiat, for one very manifest reason, namely, that a fiat may never be taken out upon it.

In *Wydown's case* (a) Lord *Eldon* describes the issuing of a commission to be "the application to it of the great seal, and delivering the commission to the party." In *Watkins v. Maund* (b) Lord *Ellenborough* said, "I must consider that a commission of bankrupt has issued when

(a) 14 *Ves.* 89.

(b) 3 *Camp.* 308.

it is delivered out under the great seal." "The issuing of the commission" (as notice) "was properly substituted for something still more loose, viz., the striking of a docket." In *ex parte Freeman* (a), when commissions received the great seal instead of the signature of the Lord Chancellor, as at present, Lord *Eldon* said, "He did not apprehend that instruments were to be considered sealed for the purpose of proceeding on them while remaining in the Lord Chancellor's hands," but "from the moment when they were delivered to the messenger who called for them."

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Mr. *Bethell*, for the respondents, was not called upon by the Court to argue the case.

Sir *John Cross* :—I see no alternative but to dismiss this petition. The date of the fiat is not, to be sure, absolutely conclusive evidence of the time of issuing it; but it is sufficient proof, *prima facie*, and nothing that we have heard rebuts it. If we were now bound to give a construction to the words of the statute, "issuing" and "suing out," I should say that "unless sued out" meant "unless applied for" within the two months. But there is no evidence to contradict the date. As to the other point, there is no evidence as to who was to be the party to determine upon the necessity for using the declaration of insolvency. There is no evidence of bad faith, and strong evidence of the necessity.

Sir *George Rose* concurred.

Petition dismissed, without costs. (b)

(a) 1 *Ves. & B.* 59.

(b) In *Cullen v. Meyrick*, 1 T.R. 361, it was held, with regard to a certificate, that an execution

against the bankrupt's goods, after signature of the certificate by the creditors, and before allowed by the Lord Chancellor, was good.

1839. From this decision the bankrupt appealed to the Lord Chancellor.

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1839.

The SPECIAL CASE stated as follows:—"This was the petition of a bankrupt to supersede the fiat issued against him. The act of bankruptcy was a declaration of insolvency duly filed, and inserted in the London Gazette on the 5th March last. The docket was struck on the 4th May following. The fiat bore date on the same day. It was delivered out to the solicitor, who struck the docket on the 6th May. The petitioner prayed a supersedeas on the ground that the fiat was not sued out within two calendar months next after the insertion of the declaration in the Gazette, as required by the statute in that case made and provided. The Court ordered and decreed that the petition should be dismissed. The petitioner insists that the order and decree is erroneous in matter of law, and ought to be reversed."

Mr. *Swanston* and Mr. *Wigram* for the appellants:—By the 6 Geo. 4. c. 16. s. 6. the declaration of insolvency inserted in the London Gazette amounts to an act of bankruptcy, provided a fiat founded thereon shall issue in two months from the date of such declaration. In this case we contend that the fiat was not issued within the time prescribed. The declaration of insolvency bears date the 4th March, and the fiat, though purporting to bear date the 4th May, was not in fact signed, and still less issued, by your Lordship, until the 6th May. This question entirely rests, therefore, upon the construction of the words "shall issue" and "sued out" in the act of parliament. The definition given to the word "to sue" in Johnson's dictionary is "to gain by legal procedure." It is not, therefore, satisfied merely by the procedure, but requires the success of that

procedure, namely, the obtaining, for its completion. The object of the legislature undoubtedly was, to free the insolvent from the consequence of bankruptcy attaching upon his declaration at the end of the two months after, unless the fiat had then actually issued, and at that moment of time the right of the party attaches to be so freed. If in a case like the present the statute is held to be satisfied, there can be no reasonable time after which a party may consider himself as safe. Within the two months a fiat might be prepared, the date being then filled up, and might not be issued for six months afterwards, and yet it would be said to be good, because a date prior to the expiration of the two months appears on the face of it. [The Learned Counsel then proceeded to read the affidavit used on the hearing below, but they were stopped by the Lord Chancellor.]

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The LORD CHANCELLOR:—The legislature gives a party desirous of appealing from the Court of Review the power of doing so, either on special case, or as the Lord Chancellor shall direct, which is, upon an original petition and affidavits (a), but he cannot adopt both forms of procedure. I cannot, in the present case, hear affidavits or travel out of the statements in the special case. That special case says, that the fiat bore date on the 4th May, and I consider myself precluded from examining into the date of the actual signature.

Mr. *Swanston* and Mr. *Wigram*:—As it is a matter within the knowledge of your Lordship's officers, perhaps you would at least inquire from them how the fact stands.

(a) This was done in *ex parte Stubbs* in the matter of *Hall*, *post*.

1839. Mr. *Bethell* and Mr. *B. S. Follett* for the petitioning creditor:—

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In the matter
of
Rowe.

This is not a subject for a special case at all. It is not a question of law or equity on which any appeal lies, but a mere question of fact. The judge of the court below did not choose to refuse a special case, as the parties were dissatisfied with the decision, but, stating the facts, left your Lordship to draw your own conclusion. [The LORD CHANCELLOR:—What is the question as to the meaning of the term “suing out” but a question of law?] As to the fiat not being delivered out by the officer till the two months had expired, the appellant’s counsel shut their eyes to the difference which exists between “suing out” and “issuing;” a difference taken by the act of parliament. No fiat “shall *issue* thereupon unless it be *sued out* within two months,” &c. The delivery out by the officer is the “issuing.” The application for and signature of the fiat by the Chancellor, which is assumed in this instance to be of the date appearing on the face of the document, and therefore within the time, constitute the “suing out.” The issuing is consequent on suing out, and the suing out is antecedent to the issuing; and unless the term “suing out” is equivalent to the presenting the fiat to the Lord Chancellor for signature, there is nothing to which the act can refer; but it is manifest that the mere delivery to the officer,—in other words, the “issuing,” need not necessarily fall within the two months; it is the “suing out” within that time which constitutes its validity. But, moreover, on reference to the 81st section, it is plain that the issuing of a fiat must be taken to be the date, for there the terms “date” and “issuing” in the conjunctive are used as synonymous. In the first provision of that section, as to contracts, the term “date and issuing” is

used; and in the next part, as to executions, the word "issuing" alone is used; so in the 82d, 83d, and 85th, and in the 86th, the term "suing out" is resorted to without any apparent distinction; so that we may safely refer all these three terms, the "date," "suing out," and "issuing," to mean one and the same thing, namely, the presenting the fiat to the Lord Chancellor for his signature. In *Wydown's* case (a) Lord *Eldon* gives the true construction of the words. In the concluding passage of his judgment he says, "There may be considerable difference in the exposition of the words "suing forth" and "issuing" the commission; the one being the act of the creditor, and the other the act of the Lord Chancellor." So in this case the "suing out," which is synonymous with "suing forth," was completed by the creditor within the two months.

1839.
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Ex parte
Rowe.
In the matter
of
Rowe.

In any way of looking at this case this appeal cannot stand. The date, as it appears on the instrument, is of itself conclusive. In any court of law, the production of the document itself, or an office copy, would be sufficient evidence of its date. If the question depended on the time of the Lord Chancellor's signature, great mischiefs would arise. If the Lord Chancellor happened to be absent from London, a creditor, though fully prepared in all other respects, would be, by no fault of his own, prevented from obtaining the remedy which the law gives him.

Mr. *Swanston* in reply:—The act of parliament is positive, and the absence of the Lord Chancellor from London, or any other such like accident, would form no ground of excuse. The act was never intended to draw a distinction between "issuing" and "suing out." But if it were not so, the "suing out" cannot take

(a) 14 *Ves.* 91.

1839. place till the document is complete, which it is not till
 signed by the Lord Chancellor. Nor even at that
 moment can it be sued out, because, as long as it re-
 mains in the hands of the officer, it is in the power of
 the Chancellor to refuse it. Lord *Eldon* has put a con-
 clusive definition on the meaning of these words in
Wydown's case. (a) This question cannot very often
 arise, because the date and suing out are generally upon
 the same day.

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Ex parte
Rowe.
 In the matter
 of
Rowe.

THE LORD CHANCELLOR:—The special case, by which alone I am bound to try the objection taken, raises no question as to the date at which the act of the great seal was completed. It states that the insertion of the declaration of insolvency was on the 5th March, and the docket was struck on the 4th May. The fiat bore date on the same day. It was delivered out to the solicitor who struck the docket, on the 6th May; and I see no reason to doubt. The question is, whether the statute absolutely requires the fiat to be delivered out by the officer within the two months. Every thing that the creditor could do, and, as I am bound to conclude, all the Lord Chancellor had to do, was completed within the time; but it appears the fiat remained in the office beyond the two months. I cannot think that was material. The “suing out” is, in my judgment, the “application for” the fiat; and it would be very hard if the creditor should lose the benefit of his proceeding by any accidental circumstance delaying the signature to the fiat. He applies within the two months, and whenever obtained, so that the delay does not arise from his default, the subsequent completion must relate to the time of such application. The rights of creditors are not to be affected by the delay of the act of the great seal. As to the delivery

(a) 14 *Ves.* 89.

out by the officer being necessary to complete it, it is immaterial where it lies. I am of opinion that the act of parliament has been complied with, especially according to what I find on the special case, out of which I cannot travel, because it is unambiguous. If there had been any doubt or ambiguity on the face of it I should, as I did in the case of *Ross* and *Ogilvie*, have called for further inquiry.

1839.

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Ex parte
Rowe.
In the matter
of
Rowe.

Petition of appeal dismissed, but without costs.

Ex parte GEORGE FISHER. — In the matter of
GEORGE FISHER and WILLIAM FISHER.

C. of R.
June 11,
1839.

THIS was a petition of *George Fisher*, against whom, in conjunction with *William Fisher*, a joint fiat had issued. The petitioner, who stated himself to be perfectly solvent, prayed that the joint fiat might be superseded altogether, or, at all events, as far as it affected the petitioner. The object of the fiat had been to defeat an award, whereby all the joint property was declared to belong to the petitioner. The petitioner offered to pay all the joint debts in full.

A petition to supersede a joint fiat (one only having been declared bankrupt), and the affidavits in support being entitled in the matter of the one so declared only :—Held defective, but leave given to amend.

Mr. *Swanston* and Mr. *Bacon* for the petition :—
William Fisher only has been adjudged bankrupt, which accounts for the petition and affidavits being entitled in the matter of *William Fisher* alone.

Mr. *Bethell*, for the assignees, opposed the application, on the ground of the informality. There was no such bankruptcy as that answering the description of *William Fisher's*, as there was no separate fiat.

1839.

Ex parte
FISHER.
In the matter
of
FISHER
and another.

Per Curiam.—They are clearly informal; and no indictment for perjury would lie in respect of the affidavits. But there is no inflexible rule of practice on the subject; *William Fisher* only having been declared a bankrupt, the error is not fatal.

The Court granted the order for supersedeas, upon the petition and affidavits being properly amended.

Fiat annulled, with costs.

C. of R.
June 12,
1839.

Ex parte SOUTHALL.—In the matter of
SOUTHALL.

Upon a question of quantum of a petitioning creditor's debt, consisting of a bill of costs, the Court has no power to inquire into the conduct of the solicitor in the proceedings out of which it arose, though alleged he had been guilty of gross neglect and misconduct.

THIS was an application to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt, and an offer to pay in full all debts proved.

The petitioning creditor was a solicitor, and the debt was a bill of costs alleged to be due to him from the bankrupt for business done in proceedings at law.

Mr. Swanston and *Mr. Chandless*.—The petitioning creditor's debt in this case consists of a bill of costs amounting to 115*l*. We say that amount is not due. We are prepared to prove that these costs could not be recovered at law, because the solicitor was guilty of such gross neglect and misconduct in the proceedings out of which they arose, and which failed through such neglect and misconduct, that we should rather be entitled to recover damages against the solicitor than he recover the amount of this bill against us. It is a principle in law that a party cannot recover for work and labour, where the defendant can show that that labour, through the neglect of the plaintiff, was uselessly bestowed.

Mr. *Russell* and Mr. *Bethell* for the petitioning creditor.

1839.

Mr. *Bacon* for the assignees.

Ex parte
SOUTHALL.
In the matter
of
SOUTHALL.

Per Curiam :—How can we try such a question here? It cannot be done either in this Court upon taxation or in any way, although the bill has never been taxed, unless the parties consent to refer the question.

By consent it was referred to the registrar to tax the bill, the petitioner paying into Court the amount of the debts proved, and the alleged petitioning creditor's debt in full, and the petition to stand over.

Ex parte SMITH.—In the matter of CLARK.

C. of R.
July 9, 10,
1839.

THIS was the petition of three trustees of a marriage settlement, praying leave to prove against the estate of the fourth sums of money alleged to have been received by the attorney of the latter, and alleging various breaches of trust, and praying consequential directions.

Petition of three trustees to prove against a bankrupt, fourth, contained charges of breach of trust, and prayed consequential directions :—
Held, Court could only make the common order to prove.
Assignees served entitled to costs of resisting the entire application.
Question of costs of employing counsel after an order taken, is determinable by the taxing officer, not by the Court.

Mr. *Swanston* and Mr. *Russell* for the petition.

Mr. *Anderdon* and *contra*, for the assignees. The petition, instead of being confined to the ordinary prayer for liberty to go in and prove, has travelled into charges of breach of trust.

Sir *George Rose* :—We can merely give the common order for liberty to go in and tender proof, without assuming any thing, one way or the other, as to the

1839. breach of trust. We have no original jurisdiction upon
 — the question of right to prove, and it is only necessary
Ex parte to come here to enable a certain party to tender the
 SMITH. proof, who without the order of this Court would have
 In the matter no such right. We only remove a difficulty in point
 of of form. By the form of the petition, the assignees
 CLARK. are unnecessarily brought here. They must have their
 costs.

Mr. Swanston and Mr. Russell :—Only the costs of
 resisting the unnecessary part of the prayer.

Per Curiam :—Yes, full costs.

July 10. *Mr. Swanston and Mr. Russell* :—One counsel has
 been retained since the order of yesterday,—merely the
 common order to prove,—was made; surely the Court
 will not also include his costs.

Per Curiam :—That is a subject we have nothing to
 do with. You must avail yourselves of the point when
 before the taxing officer. It is a mere subject for
 taxation.

C. of R. *Ex parte* RHANDS.—In the matter of MORRIS.
 July 16,
 1839. **T**HIS was an application, praying, in the alternative,
 that the petitioning creditor might be at liberty to
 amend the fiat, by striking out the name of one of
 the petitioning creditors, or that a new fiat might
 issue.

The petitioning creditor's debt was by mistake sworn to be a joint debt: Fiat had been taken out in the name of two, and had been opened: Court refused liberty to amend the fiat, but gave liberty to take out a new fiat.

Mr. Bethell, in support of the application, stated, that when the docket was struck it was thought that the debt in fact due was due to two persons as partners;

but it had since been found to belong to one of them, the petitioner, alone.

1839.

Ex parte
RHANDS.

The Court, however, thought, that as the fiat had been opened they could not amend it, but gave liberty to take out a new fiat.

In the matter
of
MORRIS.

Ordered accordingly.

In the matter of COOK.

C. of R.
July 19,
1839.

MR. *ANDERDON* applied to annul a fiat issued by a petitioning creditor, who was a party to the deed creating the act of bankruptcy, which would ultimately render the fiat open to objection. The twenty-eight days had not yet expired; and the petitioning creditor offers no opposition.

Party to deed
creating the act
bankruptcy
cannot be peti-
tioning credi-
tor.

The Court, acquiescing in the validity of the objection, granted leave to issue a new fiat.

In the matter of WILLIAM JAMES.

C. of R.
July 19,
1839.

MR. *ANDERDON* applied to change the venue of the fiat from Southampton, where the bankrupt carried on the business of a draper, to London. The act of bankruptcy was the breach of an engagement to meet a creditor. The property of the bankrupt was mostly in London, and was supposed to be concealed there in the hands of third persons, whom the bankrupt has preferred to other creditors. The petitioning creditor, and the witnesses to prove the act of bankruptcy, as well

Venue of fiat
changed to
London, object
being to set
aside fraudulent
preference to a
London credi-
tor, and all evi-
dence to prove
it, and requisites
of fiat, residing
in London.

1839.
 —
 In the matter
 of
 JAMES.

as the concealment and fraudulent preference, resided also in London, while the creditors who did reside in Southampton had often occasion to come to London on other business.

Sir John Cross :— If you put it that the principal object is to overturn a fraudulent preference in London, to be discovered by the examination of witnesses in London, and that the witnesses to prove the act of bankruptcy and the petitioning creditor reside in London,

Take the order, on payment of the bankrupt's expenses, to be afterwards recouped out of the estate.

C. of R.
July 20,
 1839.

In the matter of SALE.

An error in Christian name of petitioning creditor occurring in one part of docket papers, though right in prior part, query, if material? But leave given to amend, without prejudice. That order not discharged, except on notice of motion.

MR. SWANSTON applied for liberty to amend the docket papers, by correcting a mistake in the christian name of one of the petitioning creditors. Other docket papers had been tendered.

Per Curiam :— We cannot deprive the other party of his right, upon this *ex parte* application in his absence. You may take the order, without prejudice to his rights. The correct insertion of the names, it appears, occurs twice; they being called *S.* and *James Astley*; but the third time it occurs they are called "the said *S.* and *Jacob Astley*." This appears to be a mere clerical inaccuracy, apparent and self-evident, without requiring explanation on the face of the papers themselves, and the papers may be sufficiently correct without amendment.

Ordered, without prejudice.

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29

READER'S SURNAME

Anderton

(NO. OF SEAT)

11. 8.

CASES IN BANKRUPTCY.

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Anderton, on behalf of the party bringing in the papers, without notice or any affidavit, applied to get the above order.

1839.

In the matter of
SALE.

Curiam :—We cannot hear you, except upon a application.

application to discharge the above order refused.

the REUBEN TERREWEST.—In the matter of JOHN POYNTER.

L. C.
Nov. 4,
1839.

SPECIAL CASE on behalf of *Reuben Terrewest*. (a)

THE appellant claims to be a creditor of the bankrupt for the sum of 1,137*l.* 1*s.* 8*d.*, being the balance of a principal and interest claimed to remain due at the date of the fiat upon the following promissory note of the bankrupt; (that is to say,)—" 1,600*l.* London, 26th August 1835. Three months after date I promise to pay Mr. *R. Terrewest* or order one thousand six hundred pounds for value received. *John Poynter*, 92, Guildford Street, Russell Square. Mr. *R. Terrewest*, Lincoln's Inn Fields."

More than five per cent. taken on a renewed bill, the original loan being on bills renewable at the option of the lender, although there was a contract "not to renew for more than eighteen months," is a transaction protected by 3 & 4 W. 4. c. 98. s. 7.—Order of the Court of Review reversed.

The appellant presented his petition, claiming a lien in respect of his alleged debt on a sum of 262*l.* therein mentioned, praying relief in respect of the application of the said sum of 262*l.*, and that he might be at liberty to go before the commissioner, and prove for the balance which might remain due to him of the said sum of

(a) See this case in the Court of Review, 1 *Mont. & Ch.* 147; 3 *Dea.* 595.

1839.

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Ex parte
 TERREWEST.
 In the matter
 of
 POYNTER.

1,137*l.* 1*s.* 8*d.*, after payment of so much as should be directed to be paid to him out of the said sum of 262*l.*

The Court, having fully heard and considered the proofs and allegations of the parties, found that, in fact, the note in question was given as a security for a pre-existing debt, and that no money was actually advanced thereon; that the debt mentioned in the note was contracted for so much money lent long before, for an indefinite time not exceeding eighteen months, in consideration of the borrower agreeing to pay interest at the rate of 10*l.* per cent. per annum, and to give a series of such notes renewed every three months; and that the note in question was the last of a series of five, on all of which the stipulated rate of interest was successively paid; and that such notes were required by the lender merely as a shift and contrivance to evade the usury laws; and the Court did thereupon adjudge and decree that the said contract was usurious and void, being contrary to the statutes in that case made and provided, and not authorized by the act 3 & 4 Will. 4. c. 98., and that the said petition should be dismissed, with costs.

The appellant insists that the said judgment and decree is erroneous in matter of law.

Mr. *Wigram* and Mr. *Anderdon*:— This case falls within the 3 & 4 Will. 4. c. 98. s. 7.; and the more recent act of 7 Will. 4. and 1 Vict. c. 80. may be referred to, to show that in passing the former act the legislature had a far more liberal intention than intermediate decisions have ascribed to it. The 3 & 4 Will. 4.

The 3 & 4 W. 4. c. 98. s. 7. provides, “ That no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken

thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding." The question is, is this a *bond fide* discount of bills, or a mere loan for eighteen months, under colour of a loan on bills? — whether the bills were introduced as a mere shift and contrivance to evade the laws against usury? In *Holt v. Miers* (a) *A.* agreed with *B.* to lend him 200*l.*, at the rate of 1*s.* in the pound per month, (60*l.* per cent. per annum,) to be secured as follows: whenever any portion of the money should be advanced the borrower was to give a promissory note, payable one month after date, to be renewed as often as it should fall due, and for each renewal 1*s.* in the pound was to be paid by way of discount, and it was held that the said notes so given were within the protection of the 3 & 4 Will. c. 98. s. 7. and 7 Will. 4. & 1 Vict. c. 80. No one can doubt that the transaction was good upon the first bill. Why should it not be so upon the second, which was a mere renewal? Suppose the debtor had brought with him the money due on the

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TERREWEST.
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of
POYNTER.

(a) 3 *Mee. & Welsby*, 168.

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 of
POYNTER.

first bill when it became due, and with it the second bill to be discounted, and the money had been handed back by the petitioner, and this had taken place upon each bill, no one can doubt the transaction would have been protected by the statute. This is precisely the case here, except that the useless act of handing about the money was omitted, which makes no earthly difference. The bill, therefore, on which we claim is to be regarded as a mere renewal of the original bill, and as the first was protected so is the last. The judgment of the Court of Review was clearly erroneous, and therefore the proof must be admitted.

Mr. *Swanston* and Mr. *J. Russell* for the assignees:—The case is already concluded by the finding of the Court of Review, as stated in the special case. By that the Court, as a fact, not as a question of law, have found that it was an agreement for the loan for an indefinite period, not exceeding eighteen months. The statute confines the exception to three months bills. [The LORD CHANCELLOR:—Is any thing disclosed in the special case which would have prevented the lender from suing upon the first note when it became due?] According to the statement of the petitioner, he might certainly have done so. This was a mere loan of money, and not such a dealing with bills of exchange as the statute contemplated. The attempt was made, by the introduction of bills, to bring the transaction within the statute. To determine upon questions of usury it has always been deemed expedient to look at the facts attendant upon the agreement, rather than the agreement itself, which of course is seldom so framed as to expose the usury. The Court of Review found the facts. Sir *John Cross*, in delivering the judgment of the Court of

Review, says (a), "The bankrupt, about two years before his failure, had occasion to borrow a sum of 1,600*l.* on a mortgage of an estate, which he intended at a convenient opportunity to sell. He applied to Mr. *Terrewest*, a solicitor, to procure the loan. Some impediment arose about the title, and the solicitor then offered to advance the money himself, on the bankrupt's promissory note, payable three months after date, and renewable from time to time at the option of the borrower, for a period not exceeding eighteen months; the bankrupt agreeing verbally to pay interest at the rate of ten and a half per cent. per annum, until the estate should be sold." [The LORD CHANCELLOR:—That judgment assumes a contract for more than three months.]—And such it was. The statute is confined to the discounting or negotiating of bills of exchange or promissory notes, and the agreement to take more than five per cent. is confined strictly to discounting and negotiating bills. [The LORD CHANCELLOR:—In the seventh section of the statute there are three distinct divisions. Three distinct transactions, illegal before, are rendered legal; but in none of them is it expressed to be necessary that the loan of the money should be contemporaneous with the bill. By the latter part of the clause it would seem, that all bills not having more than three months to run would be valid.] Our argument is, that this statute does not extend to renewed bills. [The LORD CHANCELLOR:—Then you contend that the bill must be pre-existing to the debt; and further, if *A.* applies to *B.*, and says, "Lend me a sum of money," or, "Forbear to press the payment of a bill overdue," and *B.* declines, unless *A.* will give him a fresh bill at increased interest, that that would be bad.] That is our

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(a) 1 *Mont. & Chit.* 147; 3 *Dea.* 595.

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argument, and such is the effect of the decision in *Berrington v. Collis*. (a) In that case a lease and warrant of attorney were added to the security of the bills; but as there was nothing in the statute about transactions where other security was taken besides the bill, it was decided to be a loan of money upon the lease, and not on the discount of the bill. As to the case of *Holt v. Miers* (b), there is something inexplicable about it, and it is far from being a satisfactory decision; for though Baron Parke in that case considers that no bills for three months can be usurious, yet he approves of the decision of *Berrington v. Collis* (a), which invalidates a bill where a security of a lease and warrant of attorney were also taken. We say the first bill was void, because it was given to secure a loan, and was not a genuine transaction on a bill. It was a contract for forbearance for more than three months, and not confined to the mere discounting or negotiating of a bill. In *Cowie v. Harris* (c) a pawnbroker received a parcel of goods on one day, and on that and several subsequent days he advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of 3*d.* in the pound per month on those sums. It was held, that it was a question for the jury, whether this really was one transaction, and a mere contrivance to obtain a higher interest on the whole sum, in which case it is void, or whether the advances were really distinct. Suppose a contract for a loan for twelve months had been entered into, at twenty per cent., and at the end of nine months a bill for three months had been given to secure the amount; could that be good? Yet that is in effect the case here, for the bill, on which the

(a) 5 Bing. N. C. 332.

(b) *Supra*, page 353.

(c) *Mood. & Mal.* 141.

petitioner seeks to prove, is to secure the original loan made at the origin of the transaction, with ten per cent. interest.

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Mr. *Wigram* was stopped in reply.

The LORD CHANCELLOR:—

I entertain no doubt upon this question. The ground of the decision of the Court below is shown in the special case. "The note in question was given as a security for a pre-existing debt, and no money was actually advanced thereon." "The debt mentioned in the note was contracted for so much money, lent long before, for an indefinite time, not exceeding eighteen months, in consideration of the borrower agreeing to pay interest at the rate of ten per cent. per annum, and to give a series of such notes, renewed every three months." Now, taking that statement as correct, what does it amount to? There is no contract for the loan of money beyond the three months, nor any loan independent of the bills; nor do I find any thing to prevent the lender from suing upon the first and each bill, when it arrived at maturity. At most, a mere expectation is held out not to demand payment at the end of the first three months, and at the same time the lender gives notice that the borrower must not expect indulgence by renewal beyond the eighteen months.

The judgment of the Court below, as reported (a), differs materially from the statement in the special case; for in the one the renewals are to be at the option of the borrower, while in the latter nothing is said as to who the party to exercise that option should be. Deal-

(a) The reporters were favoured with a written copy of the Learned Judge's judgment.

1839. ing, as I am bound to do, with the special case only, I
— find there is no *contract* whatever for extending the time
Ex parte beyond three months. The first bill is unpaid, and
TERREWEST. several renewals take place. Why is not this trans-
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The statute provides that no bill or promissory note made payable within three months, or not having more than three months to run, shall by reason of any interest taken thereon, or any agreement to pay or receive or allow interest, in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill, &c. be affected by any statute against usury; nor shall any person drawing, &c. any such bill, &c., or lending money, or taking more than five per cent. for the loan of money on any such bill, be subject to any penalties or forfeiture. Here are distinct provisions applicable to distinct transactions. It first legalizes bills which otherwise would be void in their concoction. Next it provides for transactions with bills of themselves originally good, but which would otherwise be rendered inoperative and void in the hands of holders, by reason of their having taken more than five per cent. on the discounting, negotiating, or transferring of the same; and then, to prevent any misconception, it extends to any bill of exchange. And supposing it were read any *such* bill of exchange, this would still be within the statute. (a) This last branch of the section was necessary to protect the parties from the penalties in the old laws of usury; for though a bill might be rendered legal, the penalties attaching according to the previous laws might still be recoverable.

The judges of the Court of Review seem to have thought the statute only extends to protect bills given

(a) See *Fallance v. Siddel*, 6 *Adol. & Ellis*, 932.

when the loan is first granted, and that a mere renewal does not fall within the exemption from usury. But I cannot see why it should be so. The class of persons most likely to need the renewal of bills are those whom the legislature intended to benefit and protect, and there is nothing in the clause which would bear the interpretation that renewals were excluded. Of course, the statute only extends to protect *bond fide* transactions; but all such cases as the present fall within its protections. I am bound by the special case, and looking at that case, see nothing which indicates *mala fides*. I cannot go into the original transaction. I must, therefore, conclude that the original loan was for more than five per cent., on a transaction perfectly legal according to the recent statute; and I conceive the renewals make no difference, else all that would have been necessary was for the parties to go through the mere form of handing over the money on each renewal, and then receiving it back again, and it would be absurd to think such a form would have been required by the legislature. That is my view of the statute, and I can in no way see that it is confined to the mere discounting of bills. It first legalizes bills bad in their concoction, next enables more than five per cent. to be taken between subsequent holders, and, thirdly, declares all bills not having more than three months to run to be valid, and neutralizes all former penalties. In this case it is not necessary to go so far as in *Holt v. Miers*, because there the party pleaded what does not arise on this special case. There, there was a contract for a loan "so long defendant should pay the usurious interest."

Here, as I have already said, there was no contract for forbearance beyond each three months. The statute legalizes a bill for an antecedent debt, according to the third division I have assigned to the section. The words

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in the special case, declaring the transaction "merely a shift and contrivance to evade the usury laws," I cannot understand. On the contrary, it is a shift and contrivance confessedly to bring it within part of those laws, namely, the 3 & 4 W. 4. The special case shows a legal, and not an illegal transaction.

I entirely concur in the decision of *Holt v. Miers*. (a)

Decision of the Court of Review reversed; and it was referred back to that Court to make consequential directions, with a declaration that the petitioner had a good debt not affected by usury; and the assignees were ordered to refund to the petitioner all the costs he had paid.

C. of R. On the 22d November and 22d January 1840 the case came again before the Court of Review, on the question of the equitable mortgage, when the common order was made.

C. of R. *Ex parte* HENRY CATTLEY and another.—In the
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Petitioning creditor's debt on bill not in the hands of the petitioning creditor at the date of the fiat, bad; another debt substituted at the cost of the petitioning creditor. (b)

THE fiat bore date the 28th February 1837, and issued on the petition of *William Bell*. The petitioning creditor's debt was sworn to be due on a bill of exchange, but it was discovered that at the issuing of the fiat the bill was not in the hands of the petitioning creditor, he having, on the 4th December 1836, paid and indorsed

(a) *Supra*, page 353; and see the case of *Vallance v. Siddel*, 6 *Adol. & Ellis*. 932.

(b) As to substitution of debt, see 1 *Mont. & Ayr.*, Dig., p. 31; 6 G. 4. c. 16. s. 18.

it to the Yorkshire District Bank, whose property it was till after the date of the fiat, whereby it became insufficient to support the fiat.

The petitioners were creditors on a bill, dated the 31st January 1837 (*a*), and prayed to substitute theirs as the petitioning creditor's debt to support the fiat, at the costs of *William Bell*, the original petitioning creditor.

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Mr. *O. Anderdon* for the petition.

Mr. *Jervis* for the petitioning creditor, *William Bell*.

Per Curiam.—Take the order. The costs must, as of course, be paid by the former petitioning creditor: as he is liable to all actions, so he must take all other consequences of his mistake.

Ordered.

Ex parte JAMES BROWN.—In the matter of
JAMES BROWN.

THIS was a petition to annul the fiat upon the consent of all creditors. Upon the commissioners usual certificate, as to the creditors who had proved and claimed debts, being produced in the office, it appeared that the date of the signature had been altered, and therefore the office refused to draw up the order. (*b*)

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An alteration in the date of the certificate is not fatal, but allowed to be explained by affidavit.

Mr. *O. Anderdon*, for the petition, applied that the certificate might pass.

(*a*) The debt substituted must consent of all creditors is quite not be anterior to the original of course, and the order passes one, 6 Geo. 4. c. 16. s. 18.—*Ex* in the office (where all the documents are correct) without the necessity of a brief to counsel.
parte Hunter, 2 Dea. & Ch. 507.

(*b*) A petition to supersede on

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The Court made the order, on the petitioner filing an affidavit that the alteration in the date was made with the sanction of the commissioners, or previous to their signing the certificate.

In the matter of STOREY.

C. of R.
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Venue of fiat not changed from N. to M., though more than two thirds in number and value of creditors reside at M., and the petitioning creditor and evidence to prove the act of bankruptcy also resided there, and the act of bankruptcy was there committed.

MR. METCALFE applied to change the venue of the fiat from Newcastle-on-Tyne to Manchester. The petitioning creditor resided at Manchester, and fifteen of his creditors, being two thirds of the whole in point of value and number, being also there. At Newcastle-on-Tyne there were but two creditors only, one of whom was fully secured. The witnesses to prove the act of bankruptcy resided at Manchester, and the act of bankruptcy was committed there. The petitioner offered that the costs of the bankrupt, in travelling backwards and forwards to and from Manchester, should come out of the estate.

The Court refused to make any order.

Refused.

C. of R.
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Petitioning creditor having since the fiat, with perfect *bona fides* and in ignorance, received part of his debt from bankrupt, fiat declared valid, and to be proceeded in.

Ex parte THOMAS NESBITT and others.—In the matter of JOSEPH MOULD and CHARLES MOULD.

THIS was the petition of the assignees. The fiat issued on the 25th June 1839, on the petition of *William Witchurch*. On his examination before the commissioners he produced an account, and openly and undisguisedly admitted, that on the day after the fiat he had received from one of the bankrupts 150*l.*, part of his debt; and it appeared he had done so in perfect igno-

rance that there was any illegality or irregularity in such proceeding; and, with the approbation of the commissioners, he had since refunded the 150*l*.

Various sales had taken place under the fiat. The petitioner prayed leave to substitute another petitioning creditor's debt (*a*), and that the fiat might be declared valid, or for a new fiat at the costs of *William Witchurch*.

Mr. *J. Russell* for the petitioners, the assignees.

Mr. *Swanston* for *William Witchurch*, the petitioning creditor.

Per Curiam :—Under the circumstances, declare the existing fiat to be a valid fiat, and to be proceeded in. The petitioning creditor, *William Witchurch*, to pay the costs of this application. (*b*)

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(*a*) See 6 Geo. 4. c. 16. s. 18; 1 *Mont. & Ayr.*, Dig., 31, as to substituting debt.

(*b*) " And be it enacted, That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt."—6 G. 4. c. 16. s. 8.

1838. Bank, as after mentioned, was to be so considered. In January 1834 a prospectus was issued for the formation of a banking company, the business whereof was intended to be carried on at Manchester and at other places, under the name of the Northern and Central Bank of England, and pursuant to the Partnership Banking Act, 7 G. 4. c. 46.

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The petitioner took, first 100 shares in his own name, and afterwards 100 more shares in the name of his son, intending afterwards to make them a present to him. The petitioner was appointed a director, and also one of two trustees for the company, in whom securities by way of mortgage and other property might be vested, and so he continued till the breaking up of the company. Mr. *Henry Moul* acted as chairman of the directors, who were nine in number. It was proposed that the capital of the company should consist of shares of 10*l.* each, and that the company should commence business as soon as 16,000 shares were subscribed for; and, in order to make up the requisite subscriptions as quickly as possible, some of the projectors of the company proposed that, besides the 100 shares requisite to qualify for a directorship, there should be put down to each director 900 shares, on a "cash credit" for three years, and on an understanding that the same were not to be sold till that time; and meantime that each director was to be debited with the amount of such calls, and interest at four per cent., and credited with any dividends in

create a trading to found a fiat, cannot maintain the fiat on such a trading; but it would be sufficient to maintain it adversely against such party. *Ex parte Brundrett*, 3 Mont. & Agr. 50.

Per Sir G. Rose:—An affidavit of debt under the 1 & 2 Vict. c. 110. s. 8. is to be looked upon as strictly analogous to an affidavit to hold to bail, and as a substitute for it, and not as process tending to a fiat.

See the affidavit of debt under the 1 & 2 Vict. c. 110. s. 8., *post*, 375.—Held, that it showed sufficiently that the registered officer was duly appointed and authorized to make it, and that the company was established, and were carrying on business according to the provisions of the 7 Geo. 4. c. 46. *Dissent. Sir J. Cross.*

respect thereof; and that at the end of the three years, when some of the directors would have to go out of office, the shares should be sold, and the proceeds go to each director, after paying what was due to the company. The petitioner reluctantly assented to this, on the assurance of Mr. *Moult* and others that he should be allowed to relinquish the 900 shares at any time within three years. The 900 shares were accordingly put down to the petitioner and each of the other directors.

In January 1834 the petitioner opened a private banking account with the company, by depositing with them 100*l.*, and thereupon the petitioner was furnished with the usual pass book, after mentioned as the Current Account Pass Book, and which was headed, "Dr. the Northern and Central Bank of England, Manchester, in account current with *George Hall, Cr.*," and also with another, called the Stock Account Pass Book, which was headed, "The Northern and Central Bank of England in account with *George Hall*, stock account," in which the petitioner was debited with the calls, and interest thereon, in respect of the 900 shares, but not with the calls in respect of the two 100 shares first allotted to him, inasmuch as the petitioner paid such calls as they became due, amounting to 2,000*l.*

The company commenced business in March 1834, and continued until February 1837. An indenture of partnership or settlement, dated 1st July 1834, was made between the several persons whose names were subscribed thereto, and whose seals were affixed, except the parties of the second part, and Messrs. *Cassells* and *Walter* of the other part, for the purpose of regulating the affairs of the banking company. The indenture was executed by the petitioner and other directors, and a great number of other shareholders, and it was usual,

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except in the case of directors, to place opposite the signature of each party the number of shares then held by him; but the petitioner executed the deed with 500 shares only opposite his name, out of the 900. In the latter part of 1835, a great number of shares being forfeited or returned to the company by the persons to whom they were originally allotted, it was agreed the directors should take them between them, with liberty to sell them as they thought fit, and accordingly 445 shares were allotted to the petitioner in the name of his son, and the like number to each of the eight other directors, and another account was opened in the petitioner's stock account pass book. A private ledger was kept by the accountant of the company, in which was entered the amounts in which the directors were charged to be indebted to the company in respect of the above-mentioned shares. In June 1836, the petitioner, having discovered that several of the directors were selling portions of the 900 shares put down to them, remonstrated, in consequence of which, unknown to the petitioner, and in order to silence his objections, 100 of the 445 shares allotted to him in the name of his son were sold at a premium, and credit for the amount given the petitioner in the stock account pass book. In September 1836 the petitioner, being dissatisfied, expressed his determination to the board of directors to exercise the power reserved to him of relinquishing the 900 shares put down or entered to him on the cash credit, and offered to give up the same, and also the remaining 345 shares allotted to him in the name of his son, although the shares were then selling at a premium. Thereupon Mr. *Moult* replied, that the petitioner should be relieved from the responsibility which he complained of, and offered himself to take the 345 shares at 3,937*l.* 10*s.*, and to pay for the same by a bill at twelve months, which the petitioner agreed

to. Mr. *Moult* afterwards agreed to take 500 of the 900 shares at 5,565*l.*, payable by a like bill. This mode of payment for the shares gave the petitioner no profit. The agreement for these sales was not completed till December following, owing to the absence of the accountant, when, in order to its completion, the petitioner delivered the certificates of the 900 and 445 shares to the accountant, who accordingly made out new certificates, showing the reduced amount of shares then holden by the petitioner, and cancelled the original; and Mr. *Moult* then produced the two bills in payment of the purchase money, viz. one for 3,937*l.* 10*s.*, dated 28th November 1836, and the other for 5,565*l.*, both at twelve months, purporting to be drawn by the petitioner to his own order upon Mr. *Moult*. These the petitioner immediately handed over to the accountant, in part payment of what was charged to the petitioner in respect of the calls on the shares which had been put down or entered and allotted to or in trust for him, on cash credit as aforesaid. The accountant thereupon entered the 5,565*l.* bill to the credit of the petitioner, and the 3,937*l.* 10*s.* to the credit of the petitioner's son, in the private ledger, and also entered them to the credit of the petitioner in his stock account pass book; which entries were made to correspond with the respective dates of the bills. On the same day an entry of the transfer to Mr. *Moult* was made by the accountant, in the usual way, in the stock ledger, which showed the name of every shareholder, and the number of shares held by him, and also in the stock journal of the company. But although the petitioner expressed a wish to that effect, no entry of the transfer was made in the transfer book, because Mr. *Moult* refused to pay the usual fee of 1*s.* per share in respect of such entry. Mr. *Agnew*, a director, and Mr. *Seddon*, a shareholder,

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and one of the solicitors of the company, were present on the occasion of this transaction, which was well known also to other directors, and no objections were then raised to it. The petitioner then considered himself absolved from all future liability in respect of these shares, except so far as he was liable for the amount of the calls and interest due at the time of the transfer, and so far as he might be liable to the payment of the two bills of exchange as drawer thereof.

The company carried on the business of bankers, not only at Manchester, but at various other places where they had branch banks, and the capital consisted of 50,000 shares of 10*l.* each, which were afterwards increased to double that number, and the greater part of which capital was actually paid. In May 1835 the company established, and continued till February 1837, an office in London, where, by the means of Mr. *Cassells*, as their agent, and in his name, they carried on the business of bankers, contrary to the provisions of the act 7 W. 4. c. 46., and of the acts giving certain privileges to the Bank of England; whence, the petitioner contended, the company lost the right of suing and being sued in the name of any registered public officer.

Soon after the above transfer, the company fell into difficulties, and application was made to the bank of England for assistance, which was agreed to be granted, on condition that the banking business should be discontinued until the debt to the bank of England should be repaid. They ceased business from the 1st of February 1837. For the satisfaction of the bank of England, certain persons were appointed inspectors, to examine into the affairs of the company, and assist in winding them up.

Most of the Manchester directors were then indebted to the company in large amounts, not only on their

private banking accounts, but also in respect of shares allotted to them. A meeting of the shareholders was advertised for the 23d of January 1837, to confirm the agreement with the bank, a few days prior to which the petitioner was informed by Mr. *Moult*, still acting as the chairman of the board of directors, that the inspectors had required the directors to give security for the balances due from them to the company, and it had been accordingly arranged that the directors should execute an assignment, by way of mortgage, of all the shares then belonging to them in the company, and also of certain other shares which many of them had taken in other joint stock companies, and the calls whereon had been paid for out of monies advanced or lent by the company to such directors for the purpose; and Mr. *Moult* requested the petitioner to deliver up to him the certificates of such shares as belonged to the petitioner, in order that the requisite assignment thereof might be prepared. On the 23d of January the petitioner accordingly delivered to *Moult* the certificates for 600 shares in the company, which were the only shares then belonging to the petitioner, and the certificates for certain other shares in other joint stock companies for the above purpose. The petitioner also held a number of shares in the London and Westminster Bank, but he refused to give those up, because he had already given, as he conceived, ample security for the debt due by him to the company. The petitioner then discovered that *Moult* intended to include the 845 shares sold to *Moult* in the assignment from the petitioner, to which the petitioner objected; but *Moult* assured him the only reason for it was, that the inspectors had refused to recognize such sale to *Moult*, though that should not affect the sale; and on *Moult's* consenting to give an indemnity to that effect against any loss in respect thereof, and re-

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presenting to the petitioner, in the presence of *Mr. Lyle* and *Mr. Seddon*, that the assignment was ready prepared for execution, (it being then the morning on which the meeting was to take place,) and that it was desirable the inspectors should be able to state at the meeting that the directors had given security for the payment of their balances, the petitioner was induced to execute the assignment. *Mr. Moulton* gave a written indemnity as follows:—

“ Northern and Central Bank of England,
Manchester, 23d January 1837.

“ *George Hall* esq.

“ Dear Sir,

“ In consequence of the committee of inspectors having declined to recognize the sale of 845 shares of this bank's stock by you to me, I hereby, nevertheless, become bound to account to you for the full value thereof, as formerly agreed between us; and that, under any circumstances, you shall come by no loss on these shares.”

Messrs. *Lyle* and *Seddon*, being present, advised the petitioner that such indemnity was sufficient, and urged him to execute the assignment, which the petitioner did. But the indenture not having been read over to him, he was not aware that it contained a recital to the effect, “ that the petitioner had a banking account with the company, upon the balance of which he stood indebted to the company in the sum of 15,000*l.* and upwards.” The petitioner first discovered this some days after the execution, when he applied for a copy of the indenture. In estimating the debt at that amount, no credit was given for the two bills of exchange, but the petitioner imagined that they were excluded from the calculation because they were not due till December following. The shares in the London and Westminster Bank were

not included in the assignment, but the petitioner afterwards ordered them to be sold, and allowed the proceeds, amounting to near 4,000*l.*, to be placed to his credit with the company. The petitioner also, upon request, deposited some title deeds by way of further security with the company; but he then considered himself indebted to them in the amount only of his private account, and of his stock account pass book in respect of shares allotted to him, after giving him credit for the bills, subject to their being paid at maturity. No notice of the dishonour of the bills was ever given the petitioner, which, as drawn, was requisite, in order to constitute him liable. But although Mr. *Moult* was, when they became due, in good credit, and able to pay, they were still unpaid, and he had since become insolvent. The company never objected to the transfer of the shares to Mr. *Moult*; and, under the circumstances, the petitioner claimed to be entitled to credit for the two bills of exchange.

On the 12th January 1838 the company caused accounts to be delivered to the petitioner claiming from him a balance of 17,000*l.*, but omitting to give him credit for the two bills of exchange, whereat the petitioner remonstrated without any avail, although they had never previously objected to the original entry of them to the credit of the petitioner, and had never redelivered them to him.

About the 20th of April 1838 the company, in the name of Edward Connell as one of the registered public officers, commenced an action against the petitioner in the Queen's Bench to recover the balance of 17,000*l.*, and the petitioner gave an undertaking to appear, but no declaration was filed; and on the 14th July notice was served on the attorneys of the petitioner not to appear. On the 25th May 1838 the company filed a

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bill on the equity side of the exchequer, amongst other things stating the deposit of the title deeds by way of equitable mortgage for securing the balance due from the petitioner, and that the balance due was 17,505*l.* 12*s.* 2*d.*, which had since been reduced, and then amounted to the sum of 17,128*l.* 14*s.* 2*d.*, which, together with an arrear of interest, was alleged to be due, and praying that it might be declared that the property comprised in the deeds might stand charged as security, and for an account; that the petitioner might pay what was found due, and, in default, for a sale of the mortgaged premises; and for a receiver and injunction. To this the petitioner put in his answer in October 1838. This suit was still pending; but on the 11th October the plaintiffs attorneys in the action served a rule on the petitioner's solicitor to discontinue the action, and the same was discontinued on the 26th October. On the 17th October the company commenced another action in the Queen's Bench against the petitioner, for recovery of the balance of 17,000*l.* and upwards. Though the action was still pending, no declaration had been filed. On the 4th October (pursuant to the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8.) (a) the petitioner received a notice and copy of an affidavit as follows:—

“ Sir,

“ I do hereby, for and on behalf of the Northern and Central Bank of England, require and demand of you immediate payment of the debt sworn and deposed to in the affidavit, a copy whereof is hereto annexed, and which affidavit is filed in her Majesty's Court of Bankruptcy, such debt being due to that bank, and amounting to 15,000*l.*

(Signed)

“ John Sherette Stubbs.

“ Dated 3d Oct. 1838.”

The notice to
pay under the
statute.

(a) See this section in the Appendix.

The affidavit was not intituled in any court, or cause, or matter, and was as follows:—*John Skerette Stubbs* of, &c., maketh oath and saith, that he is one of the registered public officers of certain persons united in partnership by the name of the Northern and Central Bank of England, for the purpose of carrying on the business of bankers, under the provisions of and pursuant and according to the statute made in the 7th year of the reign of his late Majesty King Geo. 4th, for the better regulating copartnerships of certain bankers in England; and this deponent is duly nominated and constituted such officer to sue on behalf of the said copartnership; and this deponent further saith, that *George Hall*, late of, &c., but now of, &c., banker, is justly and truly indebted to the said copartnership in the sum of 15,000*l.* and upwards, for monies lent by the said copartnership to the said *G. Hall*, at his request, and for money paid by the said copartnership for the use of the said *G. Hall*, at his request, and for money due and payable from and contracted and agreed by the said *G. Hall* with the said copartnership to be paid by the said *G. Hall* to the said copartnership, for interest, and for forbearance by the said copartnership to the said *G. Hall*, at his request, of monies due and owing from the said *G. Hall* to the said copartnership, and by the said copartnership forborne to the said *G. Hall* for divers spaces of time now elapsed, at the said *G. Hall's* request, and for money found to be due from the said *G. Hall* to the said copartnership on an account stated and agreed on by and between them; and this deponent further saith, that the said *G. Hall*, at the time of contracting the said debt of 15,000*l.*, was and still is, as deponent verily believes, a trader within the meaning of the laws now in force respecting bankrupts. *J. S. Stubbs*. — Sworn at Manchester aforesaid the

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debt.

1838. 1st October 1838 before me, *Richard Claye*, Master Extraordinary in Chancery."

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Counter affida-
vit by the bank-
rupt, cutting
down the
amount of the
debt.

Commissioner
declines to re-
ceive bankrupt's
affidavit.

Fiat taken out.

About the 17th October the London agents of the petitioner appeared before Mr. Commissioner *Evans*, and tendered to him an affidavit of such petitioner, sworn at Manchester on the 10th October, denying the amount of the debt to be 15,000*l.* and upwards, and that Mr. *Stubbs*, in swearing his affidavit, had, among other things, omitted to credit the petitioner with the amount of the two bills; and stating that no account had ever been stated between the petitioner and the company, and that if a proper account were taken not more than 5,000*l.* would appear due, and that ample security had already been given for that amount; that the petitioner was willing to come to a fair account, and had no intention of leaving the kingdom, or of avoiding payment. The commissioner declined to receive the affidavit, on the ground he had no jurisdiction, under the act, to enter into the question of what was really due, and had only power to ascertain that there were two sufficient sureties to the bond required by the statute, having regard to the debt sworn to be due. The petitioner not finding the sureties required by the statute, although prepared with sureties for the amount really due, on the 30th October, Mr. *Stubbs*, as registered public officer, and on behalf of the company, caused a docket in bankruptcy to be struck against the petitioner; and on the 31st the fiat complained of was issued at his instance, as petitioning creditor, directed to the Manchester commissioners, who, on the following day, adjudged the petitioner bankrupt, and notice of such adjudication was, on the 2d November, given in the London Gazette. In the affidavit, on striking the docket, the petitioner was described as a banker at Manchester. The trading and act of bankruptcy were

challenged; and the petitioner stated, that, except as aforesaid, and to his solicitor for costs in this matter, he was not indebted to the amount of more than 5*l.* to any person or persons. The petitioner went on to state, that by the deed of settlement of the company, it was, amongst other things, provided, that in case losses should be sustained by the company to the whole amount of a fund called the reserve surplus fund, but also to the amount of one fourth of the capital actually paid, then the Manchester directors should be bound, and were thereby required, to call a general extraordinary meeting, to consider the propriety of continuing or dissolving the company. But, although thereto requested, the directors, including *Connell* and *Stubbs*, refused, alleging that such losses had not been sustained. That if such allegation were true, there would, on winding up the affairs of the company, after allowing 10*s.* per share for expenses thereof, be due 7*l.* per share to each proprietor, making, on the 1,445 shares to the company for securing the petitioner's debt, a sum of 10,115*l.* That the shares in other joint stock companies assigned by the petitioner were worth 3,100*l.*, and the property comprised in the deeds deposited 3,000*l.*, making altogether 16,250*l.* That, assuming a greater loss to have happened, the company would have ample security for the debt really due to them from the petitioner.

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Bankrupt's
shares still
worth 7*l.* per
cent.

Mr. *Anderdon* and Mr. *Geldart*, for the petition :—

The petitioner's
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The two principal points on which we rely are, first, that it is not competent to the company to sue out a commission of bankruptcy against one of their own shareholders, in respect of a debt due to this company, that debt being in respect of an unsettled account. It is distinctly sworn, in the affidavit of Mr. *Hall*, that

Query, Whether,
under 7 G. 4.
c. 46. and
1 & 2 Vict.
c. 96., a joint
stock bank can
sue out a fiat
against a share-
holder upon a
debt in respect of an unsettled account, precluding the debtor's right of set-off?

debt in respect of an unsettled account, precluding the debtor's right

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there never has been any account settled or agreed upon between him and his copartners; and although it is attempted to introduce statements in the affidavit on the other side, from which it might be at first inferred that there has been a stated and settled account, yet it is clear, upon an inspection of all the affidavits, that there never has been an account stated or agreed upon in those terms which would have enabled the company, independently of the statutes 7 G. 4. c. 46. s. 9. and 1 & 2 Vict. c. 96. s. 1. (a), to have sued this partner at all; there is no settled account which would have enabled this company to have sued this gentleman at law. That they themselves thought so is incontestible, because in April 1837 they actually commenced an action against the petitioner, under the 7 G. 4. c. 46., and abandoned it soon after. Independently of these statutes, there is no settled account which would have taken this case out of the general rule, that one partner cannot sue another, except where there has been a settled account. Such being the case, the question is, whether this company, either by virtue of the 7 G. 4. c. 46. s. 9. or 1 & 2 Vict. c. 96. s. 1., are enabled to do that, which, it is clearly admitted, they, without those acts, could not have done. Referring to the 9th section of the 7 G. 4. c. 46., it will appear that there is a distinctness in the language, with respect to that part of it which enables these companies, in the name of their public officer, to present a petition for the purpose of founding a commission of bankruptcy. The words are, "Be it enacted, that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership, carrying on business

(a) See these sections in the Appendix.

under the provisions of the act." There it ends; it does not say, "all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartners, carrying on business under the provisions of this act, *whether they shall be partners or not*;" but there it stops, and then begins, as it were, again, "and all proceedings at law and in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted, for or on behalf of any such copartnership, against any person or persons;" there again describing the persons against whom those second proceedings may be adopted. It first says, certain proceedings, actions, and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership; then it describes other proceedings, and describes other persons against whom they may be taken; it says, "against all proceedings at law or in equity under any commission of bankruptcy,"—as we understand it, "under any commission of bankruptcy which is sued out at the instance of another person;" any commission of bankruptcy sued out at the instance of third parties. We apprehend, under this clause joint stock banks may, by their public officer, take any proceedings under a commission; for instance, in the case of an equitable mortgage it might be competent for the public officer to petition the Court for a sale. That would be a proceeding under a commission of bankruptcy against any person or persons, notwithstanding such person be a partner. So that there are two descriptions of proceedings. In the commencement of it, it says, "Actions and suits, and all petitions to found a commission of bankruptcy against any person who may be at any time indebted to any such copart-

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nership;" then, with respect to "all proceedings at law or in equity under any commission of bankruptcy," which were satisfied by referring them to a commission of bankruptcy, taken out at the instance of third parties. "Take any proceedings at law or in equity;" that is, at this time it might have been necessary to have petitioned the Court of Chancery, under a commission issued at the instance of a third person. There is, therefore, a clear distinction, in this case, between the person against whom they may petition, and the person against whom they may take any other proceedings. But even if that were to be considered as a distinction too refined, then, in construing an act of parliament which gives an extraordinary power, and which acts oppressively against individuals, courts will exercise their jurisdiction with the greatest caution, and will see the words of the act clearly satisfied. [The CHIEF JUDGE:—You would put in a parenthesis from the words, "and all other proceedings at law or in equity," down to the end of the sentence relating to copartnerships.] Then it would be, "that all actions and suits, and also all petitions to found any commission of bankruptcy, against any person or persons who may be at any time indebted to any such copartnership, carrying on business under the provisions of this act, and all proceedings at law or in equity under a commission of bankruptcy, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers." Then the persons against whom the fiat in bankruptcy which may be issued would be persons who are indebted to the company, but not a partner. But supposing that distinction not sufficient to act upon, taking the sentence altogether it would only amount to this; that there are words in this act, which make it doubtful whether the legislature intended

to alter the right of one partner suing against another, or taking out a commission, on account of the words "whether a member of such copartnership or otherwise." [Sir *John Cross*.—Has the legislature any other intention than to substitute the public officer for the partnership?] When this act established joint stock banking companies, under certain provisions which it enacted, it occurred to the legislature that there would be very great difficulty, if not an absolute obstacle, to any of these companies, on account of a number of persons, suing any person indebted to the company. It seems that the sole intention of the legislature in this clause was this, that whereas before in the case of six partners five might have sued the other, or the whole of the partnership might have brought an action of law or filed a bill in equity against any person indebted to the company, that this clause enabled the other partners to do that in the name of their public officer. [The CHIEF JUDGE:—How before that act could the five sue the one at law for a debt due to the firm?] In this way,—where there had been a settled and signed account, and an admitted balance from one of the six partners to the other five, that then those five might have sued the other partners at law. [The CHIEF JUDGE:—Because that is not a partnership debt; that is a debt due from the one to the five; not a debt due from one to the six.] [Sir *John Cross* :—You may sue a former partner, but can you sue one in a subsisting partnership?] Perhaps not; but this act is so obscure that it has been supposed to refer to some cases of that kind where the partners might sue each other, and if not so, it might be clear, according to this act, that this act alone enabled this body to have sued their own partner; but yet we find that there was in this very case an action commenced against Mr. *Hall* in April last,

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argument.*Query*, Whether,
under the
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a company
could sue its
member at law
in respect of an
unsettled part-
nership debt,
precluding set-
off?

and probably under this clause. But what was the fate of that action? They found they could not proceed with it. At least we find that they *did* not. And we have the reason why. It became the subject of discussion in Westminster Hall, whether this clause did in fact enable any partner to sue another, in the case of a public officer, in cases where it could not before; whether this clause had gone any further than to say, what a partnership might have done before in their own name they should now do by a public officer. The better opinion is, that it was meant to confine it to this, because the words are equally large which apply to a commission of bankruptcy as to suing at law. Now the presumption, that the 9th clause in the 7 Geo. 4. c. 46. (a) did not enable the company to sue at law, arises from the circumstance, that the legislature has actually been under the necessity of passing another act, which act refers to this, and recites the doubts and difficulties that have arisen under it. But what did the legislature intend by the second act? They enabled the company to sue any member of their own body; either to bring an action at law, or to sue either at law or in equity, in language more clear than they did in the other act, and it is the only act which gives or was intended to give the company power to sue a partner in respect of a partnership debt. But then, as to the difficulty which arises as to the set-off, there is this fourth clause in the 1 & 2 Vict. c. 96. (b), which certainly seems a very severe one; but here it appears "that no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus payable or apportionable in respect of such shares, shall be capable

(a) See the Appendix.

(b) See the Appendix.

of being set off, either at law or in equity,"—throughout this act it makes use of the words "at law or in equity,"—against any demand which such copartnership may have against such member, on account of any other matter or thing whatsoever, but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof. [Sir *George Rose*.—I do not understand you to go to the extent of saying, that an action could not be brought, but that, from circumstances affecting the record, they thought it right to discontinue that which they commenced.] [Sir *John Cross*.—How do you understand the new act to interpret the powers of the old?] We apprehend the act 1 & 2 Vict. c. 96. enables them to bring an action at law. [Sir *John Cross*.—Could not that have been done before under the ninth section of the 7th Geo. 4.?] No; otherwise it would have been unnecessary to pass this act. What we argue is, that, under the 7th Geo. 4, an action at law could not have been maintained in respect of an unsettled partnership debt; that the only act which enables them to support that action is the 1 & 2 Vict. c. 96. [Sir *George Rose*.—It is very important to see how you put your argument. We can only hold that no commission of bankruptcy can stand by holding that no action could have been maintained. I want to know how far you are arguing it. Whether you are arguing merely from the circumstance of the discontinuance of the action, or whether you mean broadly to say that the arrest could not be made.] [The CHIEF JUDGE.—I understand you to say, that under the 7th Geo. 4. the public officer of a banking company established under that act could not commence, maintain, or prosecute an

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action at law against a partner of their firm.] In respect of an unsettled account; in respect of a debt due from their partner to the firm, arising out of partnership transactions.

Now the 1 & 2 Vict. c. 96. (a) is entirely silent in respect of proceedings in bankruptcy. It is in vain, after the case of *Guthrie v. Fisk* (b), for one moment to contend that an act of parliament enabling this company to sue either at law or in equity can, in the absence of other language, enable them to take out a fiat in bankruptcy. That case is quite decisive that an act enabling any company to sue either at law or in equity would not, from the force of its terms alone, enable them to sue out proceedings in bankruptcy. [The CHIEF JUDGE:—That is quite a different question. Here the words “petition in bankruptcy” are introduced in the 7th Geo. 4.] The words “petition in bankruptcy” are merely confined to persons indebted to this company, not partners. [The CHIEF JUDGE:—I do not see how you found the distinction, between a debt arising due from the partner to the firm in respect of any banking account that he might have kept in the firm himself, and an account arising between himself and the firm with respect to any shares he purchased. You drew the distinction between debts arising out of a partnership account and other debts. I only want to see whether you mean to argue, that a public officer under the 7th Geo. 4. could not, in the name of the firm, have sued any member of that firm for any debt; or whether you confine it to any particular class of debts.] We certainly put it generally, that it was not competent to sue for any debt due by a member of the firm to the partnership. [CHIEF JUDGE:—What

(a) See post, Appendix.

(b) 5 Dow. & R. 24; S. C. 3 Barn. & Cr. 178; 3 Stark. 155.

meaning do you put upon these words, "whether member of the firm or not?"] Your Honour well knows that is a difficulty. The point has been very much mooted in Westminster Hall, in consequence of the introduction of these words. [The CHIEF JUDGE:—What meaning they were intended to have it is impossible for me to say; but we must give some meaning to them. We cannot suppose the legislature introduced these words without intending some meaning. I want to see what is the meaning that you put upon them.] What the legislature must have meant is this: Your Honour knows there are certain cases in the books in which it is laid down, that in cases of settled accounts one partner may bring an action against another. [The CHIEF JUDGE:—Because that is a debt not due from the partner to the firm, but a debt due from one individual to another individual, in respect to transactions which had originated from the partnership; but here is a power given for a firm, or public officer in the name of the firm, to bring an action against the member of the firm, thereby making a partner both plaintiff and defendant.]—In common parlance, suppose we say there is a partnership of two persons; up to Christmas they settle and sign the balance of an account; and upon the balance one partner, A., admits he is indebted to B. 1,000*l.*, and then they continue their partnership; I apprehend that B. might have brought an action against A. for the balance, 1,000*l.* [The CHIEF JUDGE:—That is not a partnership bringing an action against one of its members, but one individual bringing an action against another.] In common parlance, this might be sufficient to satisfy those words. Very true, he would not be suing him in respect of a partnership debt, but he would be bringing an action at law against his partner. [The CHIEF JUDGE:—The legislature must be supposed to have known that would be no objection, there-

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fore they would not have thought it necessary to introduce the words, "whether members of such copartnership or otherwise," if the debt for which they sued was not a partnership debt.] Your Honour observes the words "to found any commission of bankruptcy;" it is confined to the words "any person or persons." What we submit is, that the words of this act, "whether members of such copartnership or otherwise," would be satisfied by the case which we put. Suppose that Mr. Hall, at Christmas 1837, had admitted he was indebted to the banking account, upon a balance of all accounts whatsoever, in a sum of 1,000*l.*, then we apprehend they may, perchance, under this act of parliament, have brought an action, in the name of their public officer, against him in respect of that debt, although he was a member of the continuing partnership. In common parlance, it would have been an action against a partner. [The CHIEF JUDGE:—It would not have been an action by the firm, including this partner; therefore it could not have been an action by the firm against the partner, because he would be both plaintiff and defendant. Your statement is, that, independently of this act of parliament, a partnership might have brought an action against one of its members in respect of a debt due from the partner to the firm. The fact is, you are wrong in your statement; the firm could not have brought such an action.] The firm could not. The words of the act, strictly speaking, ought to have been, "on behalf of such copartnership, except the partner against whom the action is brought." If those words had been introduced they would have satisfied all the words of the act. If you add those words, "and all other proceedings at law and in equity to be instituted on behalf of any such copartnership, except the partner against whom the action should be brought," the statute would be more

intelligible. [The CHIEF JUDGE:—Supposing they recover the debt, what is to be done with it when recovered? Is not this partner to have his share of the debt?] All this difficulty has arisen, against whom are they to sue out execution, suppose you could bring an action against a partner;—supposing it was the intention of this act to have given a power to the partners which before they had not, then surely this same act (if such had been the intention) would have provided for taking out execution. That is where the difficulty arises; and that is the object for which the statute of Victoria was passed. It is extremely difficult to satisfy all the words; you must look at the whole clause together.

This Court will not hold that the legislature intended so great a variation in the usual law of partnership. Surely, if the legislature intended to introduce such a new law as is here introduced, namely, that partners might sue each other where they could not before have done it, they would have introduced it in language plain and explicit, in the same way as they have done in the 1st and 2d of Victoria; they would have foreseen all the consequences. In the 1st and 2d of Victoria the legislature clearly and distinctly foresaw the consequences; they foresaw that when an action was brought partners might set up a counter claim; they might file a bill in equity, stating, “ True it is here is a balance “ due from me to you of 15,000*l*.; but, on the winding “ up of the affairs of the copartnership, there will be a “ still larger balance due to me;” or, “ the balance will “ be reduced.” Therefore the legislature has provided that no counter claim or demand should be set up. But, did the legislature intend that this act should be applied to so extraordinary a commission of bankruptcy as this? Clearly not. This act says, that where an action or suit is brought no counter claim or demand in re-

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spect of any dividends or shares shall be set up. But can that be the case in bankruptcy? The very moment this fiat issues, what is the consequence?—that there is an end of the company, as between the bankrupt and the rest of the partners. It becomes the duty of the assignees to take an account of what, upon winding up the affairs of this concern, is due to the bankrupt. You must of necessity set off the counter claim in respect of what is due to the bankrupt; for the shares which are said to belong to him on winding up the affairs of the company, must, *ex necessitate*, be set off against the demand in working out the fiat against him. Therefore, what we submit on the first point is, that under the 7th George 4. they were not entitled either to sue out a commission of bankruptcy against this partner, nor were they entitled to have brought an action at law against him in respect of this particular demand; and we say that the act of Victoria does not carry it further, because it is entirely silent with respect to proceedings in bankruptcy; and when you look at the consequences which would ensue if you gave that construction to the act, —which no judge in Westminster Hall has ever yet done,—which the best lawyers in Westminster Hall have felt they could not do,—that although numberless actions have been brought under this act, and amongst the rest that of Mr. Hall, not one of them has taken the opinion of the Court upon the clause, whether such an action could be maintained; that the best special pleaders had advised that it was so doubtful you had better discontinue your action, and introduce a new act of parliament, which will make it quite clear you shall be sued at law,—and that action has been discontinued, and a fresh action brought;—if your Honours were now to hold that they could sue at law, or issue a commission on an unsettled partnership account, precluding set-off,

the consequence would be, that you would hold that the act of Victoria is altogether unnecessary.

Sir *George Rose* :—I think it is difficult to follow you to the conclusion, that they could not sue at law. Before the 1st Victoria it might have been very expedient to discontinue the pending action ; still that does not go to the extent that they could not sue at law, and that that action was not properly commenced. At all events, it strikes me that in that way it would bring it to this necessary conclusion : If you could carry it to this extent, that an action could not have been commenced, it follows as a consequence that the fiat is good for nothing ; but if it was merely left in doubt whether the action, having been rightly commenced, its continuance was a matter of discretion, then, whatever might be the mind of the Court with regard to the construction of the act, it of necessity leaves that question to be tried in an action by you against the assignees. If that is left as a case of doubt, our superseding the commission would be the wrong way to act upon the doubt. Our way would be to continue the fiat, because then you could bring an action. If you cannot carry it higher than a matter of doubt, it will be a matter of necessity to leave the fiat as it is. The law is in that state of doubt that we should not think it right to supersede the commission. If we were of opinion that an action could not be brought under the statute of the 7 Geo. 4. c. 46. (a), we must supersede the commission ; but if our minds are brought to a doubt, it is our duty not to supersede the commission, because we then take away the only mode in which both parties are left open to get it determined.

Mr. *Anderdon* and Mr. *Geldart* :—Upon looking at

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If it be doubtful whether an action is maintainable to recover a petitioning creditor's debt, it is the duty of the Court to uphold the fiat, so as to give an opportunity to try that right in an action by the bankrupt against his assignees.

(a) See the sections in the Appendix.

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the act of parliament, it is an argument which will bear some consideration, although it is not conclusive, that if the legislature intended to do more than to enable the company to do, in the name of their public officer, what before the act, if the parties had been less in number, they could have done in their own names, that in making so important an alteration in the law as regards partnership they would have done it in language clear and explicit, and would have provided for all the consequences, in the same way as they have done in the act of Victoria: there they anticipated the consequences, and have provided for them. We say, that under this act of parliament they were not entitled to sue out a commission or bring an action at law; and if that is so, it is quite clear our objection to this fiat is good, that it is only an equitable debt, and not a legal debt. [The CHIEF JUDGE:—If you look to the concluding part of the clause of the act of parliament, it says this: “And that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers.”] That is in the act of Victoria. Under the act of Victoria, merely enabling the bringing of an action, they could not have issued the fiat in bankruptcy. Mr. Hall swears he is solvent; he swears that the company have already securities which are amply sufficient for the payment of what may be found due; and, in the petition, a calculation of the value of these securities is made, by which it appears that, even supposing he is indebted to them in this large sum of money, they have a good security: it is clear they have, as against Mr. Hall and Mr. Moul, the security of 1,445 shares for this debt. Now, it is provided by the act of settlement, that “if ever there are losses by the company to the amount of 25 per cent. of their capital and of the reserved fund there should be a meeting to dissolve the

company." But the directors say there was not a loss to that extent; so that, according to their own showing, on the winding up of this account, — which must be wound up, — there will be (after allowing 10s. a share for the expense of winding up the affairs) 7*l.* upon each share due to this bankrupt; that alone makes 10,000*l.*; and there are other securities, making altogether a security amply sufficient for securing this debt. And if your Honours feel any doubt as to the superseding of this commission, you will attend to the injury that may be done to both sides. What injury can arise to this company if this fiat be superseded? It is sworn that Mr. Hall, with the exception of the debt due to the company, does not owe 5*l.* in the world, except what he may be indebted to his solicitor in respect of his expenses under the various proceedings instituted by the company; he swears he is solvent. The company have themselves got the security for these shares; they have got an equitable mortgage upon real estate in Manchester, and they have got a suit in the Exchequer, to take an account of what is due to them under that security, and making it effectual against Mr. Hall.

Sir George Rose : — Just be good enough to turn this over in your mind : There is nothing which prevents a partner from taking out a commission of bankruptcy against his copartner; but the objection is, that a commission cannot be taken out for an equitable debt. Is not the effect of both these acts of parliament, construed together, to have made a debt from a member of a partnership a pure legal debt? In the first place, by allowing the partnership to sue a member of the partnership, it takes away the objection which would make it an equitable debt. With reference to the record at law, the record may be made up by a member of the firm suing a person who happened to be a member of

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the partnership. Supposing it cannot be put that the action is not maintainable; having got that length, unless this statute of Victoria had come into operation it would have remained an equitable debt, because those who seem to have discontinued the former action I think may be presumed to have acted upon that principle. First, it was an equitable debt, either by set off or matter of account, which might have been affected by an action at law, or a bill might have been filed in which an injunction might have been obtained to restrain the action at law. Therefore, although the former act of parliament cured the difficulty of making up the record, it still left it an equitable debt, because it had not taken away the set-off. It possibly would have made it a matter of set-off, or let in a court of equity by its injunction; but if you look at this act of Victoria you find it takes away every shadow of doubt; it excludes the set-off, and takes away the interference of a court of equity by its injunction. If, therefore, you brought the relation of the parties to that state, you have left it as a pure legal debt; and then, if you brought it to the character of a pure legal debt, where is the principle that a pure legal debt may not be made the subject of a commission? But we find in the 7 G. 4. c. 46. the express words, "to sue out a commission of bankruptcy." Well then, the commission of bankruptcy must of course refer to the authority which is there given, which can only, I admit, go to a legal debt. It is only reasoning back: I find a legal debt; and if I find a legal debt all this argument (according to the mode in which I view the act of parliament) *ab inconvenienti* falls to the ground; because in an equitable debt the partnership could not have proved under the commission, voted in the choice of assignees, signed the certificate or done any thing under the commission; therefore it would be

absurd to give liberty to take out a commission; but when you once make it a legal debt all this argument falls to the ground. Therefore, unless you can carry it to the extent that that action was an action that never would have been allowed, I cannot get out of the consequences, that leaving it as a legal debt gives a party a right to take out a commission. Then follows this conclusion, that you would be bound to give the bankrupt the benefit of the doubt, if it is left as a fair doubt; but if it is put into a state of things which we are told that the authorities of Westminster Hall consider it a matter of doubt, it becomes our duty to continue the fiat.

Mr. *Anderdon* and Mr. *Geldart*.—We understand your Honour to put it in this way, that the act of Victoria, by enabling the parties to sue, constitutes it into a legal demand. [The CHIEF JUDGE:—Yes; and there is nothing which prevents one partner from taking out a commission against the other, but that it is an equitable debt in any way of putting it. If the effect is to leave this a legal debt, then there is no reason why a commission should not be taken out.] [Sir *George Rose*:—If you look at the nature of the company, it follows as a necessary inference that they must sue each other.] Your Honour seems to take it for granted, that because the act enables the company to bring an action for this partnership demand that it necessarily constitutes it into a legal debt. [Sir *George Rose*:—I may be wrong, but my feeling is pretty strong. The first act of parliament gives the officer a right to sue any person, though he was a member of the partnership, for a partnership debt; still that would have left it an equitable debt. Such a partner might have filed a bill, and said, although it is an equitable debt, although the parties had liberty to petition, it must be taken with all its circumstances; you must petition upon a legal debt. But when you

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call in the statute of Victoria, which takes away the injunction, and connect that with the right of petitioning, then you find that a person who has a legal debt is authorized by the act to petition for a commission.]—The inference, merely enabling this company to sue, does not *ex necessitate* constitute a legal demand.—[Sir George Rose :— It would constitute a legal demand, qualified by equitable circumstances; and if those equitable circumstances existed to qualify the legal demand, we should be entitled to call this an equitable debt; but the act has taken away the right of the demandee to qualify the demand by the equitable circumstances. Then, as it appears to me, it is left a pure legal debt.]—Then the very circumstance, of that demand which the partner would have had in equity being taken away by this act, shows that the mere circumstance of enabling the copartnership to sue at law, which is given by the first section of the act, does not, as a matter of course, constitute a legal debt. [Sir George Rose :— Unless you are right in putting it that the action at law was wrong, which I submit it was not.] We wish to meet the difficulty your Honour has thrown out; we understand it to be this, that the act of Victoria constitutes it a legal debt. Therefore, being a legal debt, there is no reason why the partnership should not sue out a commission. As we understand you to put it, when once you constitute it a legal debt then the rule which disables one partner from suing out a commission against another ceases. [Sir George Rose :— Precisely; it is the relation of partnership that creates the difficulty. It is the difficulty of making up the record at law that makes the difficulty.] [Sir John Cross :— We have not heard what the legal debt is, whether it is the final balance of account, or a debt of monies advanced to the bankrupt. We have not heard which way that is put, on the other

side, to constitute a legal debt.]—It would be carrying the intention of this act of Victoria much further than was intended by the act itself.—[*Sir George Rose* :—The language of the 4th section is very strong :—“ Be it enacted, that no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or any dividends, interest, profits, or bonus paid or to be payable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing.” Now is it too strong to treat that as a demand in which a set-off in law or in equity might be made applicable; and that is involved in the enforcing of a demand by a copartnership against a member, taking away from it the dealing with it as an account, and the dealing with it in a court of equity.] It was not the intention of the act of Victoria, by merely enabling the party to sue, to constitute the demand into such a legal debt as would be followed by all the consequences to which your Honour has adverted. [*Sir G. Rose* :—It would be a monstrous thing, in a society founded for dealing in bills of exchange, and in the nature of a banking business, where a cause of action arises upon every one of those bills of exchange, —it would be a monstrous thing to have left the law in that state, that if an action had been brought against any one of these persons, a bill in equity could stop that action. It is impossible not to see, in dealing fairly with the intention of the legislature, that that is a mischief which they would properly legislate against.] The act of parliament provides for actions upon bills of exchange, not upon actions flowing from partnership transactions on a capital account. [*Sir George Rose* :—That

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and 1 & 2 Vict.
c. 96., excluding
the right in a
partner in a
company to set-
off, was not in-
tended to apply
to cases only of
bills of exchange
or pure bank-
ing accounts
due by the part-
ner, and not to
transactions
involving the
account of the
capital.

is a very pertinent observation.] This act was intended to meet the difficulty your Honour has thrown out. [The CHIEF JUDGE:—With respect to that observation, this debt is a debt due from Mr. Hall in respect of shares taken by him from the society; not in respect of his capital in the society, but in respect of certain debts that he owed to the society for shares which he had taken.] The shares constitute his capital. [The CHIEF JUDGE:—Yes; but the debt is the price to be given by him for that capital.] Still it is the only measure of capital; the capital is constituted of shares. [The CHIEF JUDGE:—What I understand you now to argue is, that the public officer might sue a member of the firm in respect of any banking account kept with the partnership, but could not sue a member of the firm for the price of any shares which he had purchased in the partnership.] Precisely; because the value of the shares and the amount of obligation can never be estimated until the partnership affairs are wound up. [The CHIEF JUDGE:—Suppose I undertake to pay a specific sum.]—He has not undertaken to pay that sum; because, among themselves, there is no liability to contribute, except *inter se*, and, *non constat*, ninety-nine persons out of a hundred are not in the same predicament as himself. If this had been a pure banking account, kept by one partner of the banking company, it might be contended that the first act of parliament met that point; and the second act shows that that is the point, and no other; and if you refer to the clause excluding set off that conclusion follows, or it means nothing; therefore the act of parliament was precisely as Sir *George Rose* has intimated, to enable the body as *quasi* corporate to sue in respect of contracts upon bills of exchange or otherwise, which but for the act would not have occurred. [The CHIEF JUDGE:—Then

you would still argue, that if an action were brought by the company, or by a public officer of the company, against any one of the members, for the price of any shares that the member had purchased, they might claim to set off his interest in that company.] If we were called upon to give an opinion upon that act of parliament, we should say, certainly not; but it is not necessary to go that length. It is only for us to show that there is a limited operation which may be given to the first act; and if so, then the general operation of the act cannot apply to this case, because you cannot complicate an account. [Sir John Cross:—He who takes, for instance, 1,000 shares, undertakes to bring 10,000*l.* capital into the concern; that is the meaning of buying shares, one would suppose.]—And, *non constat*, the persons who are suing him are not in precisely the same predicament, of not having paid for their shares. [Sir John Cross:—It is the whole body who sue.]—There are nine hundred and ninety-nine persons of this body suing the thousandth; and not one of them has done that which they complain the other has not done. [The CHIEF JUDGE:—I want to know the distinction between an action brought in the name of the company with respect to the price of the shares, and an action brought in the name of the company in respect of a bill of exchange, or any independent transaction.]—If it is necessary to give any construction to the 7 Geo. 4. c. 46. in respect of the words “member of the company or otherwise,” the sense and meaning is, that it enables the banking company to sue their co-proprietors in respect of those matters which would be foreign to the capital, and would not, *ex necessitate*, involve the consideration of whether or no they were debtors or creditors on account of capital; and for this reason, that it would be hard to say that bills of

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is only a balance of 1,455*l.* and a fraction; all the rest is in respect of partnership demands on account of unpaid capital. When the partnership was constituted, Mr. *Hall* applied for 100 shares in his own name and 100 in the name of his son. The 2,000*l.* capital in those shares has long since been paid. He was then, as he says, induced to allow, upon an understanding and agreement between all the directors, that they should each have allotted or put down to their names an additional 900 shares, upon an express understanding between them, which is not denied, that those shares were to be on the cash credit,—that they were not to be compelled to pay for those shares till the end of three years. But before the end of those three years this company had actually ceased to carry on business. On 1st February 1837 they ceased to carry on business. How was the relation of the parties altered? Could they say to Mr. *Hall*, “We call upon you to pay up your capital, amounting to upwards of 12,000*l.*” For what purpose do you call upon me, and other shareholders who are in a similar situation, to pay up our capital, when the sole object of paying up our capital, namely, to enable the company to carry on their business of bankers, and employ that capital profitably for the company, is at an end? The demands against the company are alleged to have been all paid. [The CHIEF JUDGE:—I think, on the face of your petition, you admit 1,455*l.* is due upon the banking account; more than enough to support the commission. That does away with all question of the nature of the debt. It brings it back to the simple question, whether the banking company could take out a commission of bankruptcy against a member of that firm.]

As to the act of
bankruptcy.

The next point is, that there has been no act of bankruptcy, unless that under the 8th section of 1 & 2 Vict.

c. 110. is sufficient. Now that clause appears to have been copied from the 45 Geo. 3. c. 124. s. 1., enabling creditors, under certain circumstances, to take out a commission against members of parliament; and the construction of that act came before Lord *Eldon*, in the case of *ex parte Harcourt* (a), and then Lord *Eldon* held, that the act of parliament gave an unusual and an extraordinary remedy against other persons, and that every form and every regulation which was required by that act ought to be strictly complied with; and inasmuch as the affidavit had been imperfect, and was not distinct, he held that it was not sufficient, and the commission which had been obtained against Mr. *Harcourt* was superseded. Lord *Eldon* there says, "Where a statute enacts that a person of a given character shall be, under certain circumstances, a bankrupt, upon what ground can the adjudication of his bankruptcy, by those commissioned to pronounce that adjudication, be supported, but upon proof before them that he sustains the character and is within the circumstances required? And where part of those requisite circumstances is, the not having done certain specified acts, his default in the acts required must be proved. With reference then to this, how does the commission stand? Upon the evidence of a person incompetent to prove an act of bankruptcy, and who, if he could be admitted for that purpose, has spoken to a most material ingredient in it, not upon the deposition before the commissioners, but in another court, and for another immediate purpose."

Now the suing out of the fiat in bankruptcy, under the 1 & 2 Vict. c. 110. s. 8., is, in this Court, similar to suing out any process or writ in any other court; and no court will allow a process to be made use of for the

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(a) 2 *Rose*, 203.

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purpose of oppression, or under harsh circumstances, to which the act of parliament, according to its true spirit and intent, was not intended to apply.

The harsh proceeding which, under this clause, has been adopted towards this gentleman is obvious. In the first place, Mr. *Stubbs* makes an affidavit, in which he says, Mr. *Hall* is indebted in 15,000*l.*, and that it is on an account stated and agreed upon; but there never was an account stated or agreed upon. And unless Mr. *Hall* can find security to the full amount of that debt, they say he is to be deemed to have committed an act of bankruptcy. Now, we ask whether it was the intention of the legislature that so harsh a measure should be allowed as between partners, that any one partner may swear there is a debt due to him from another partner, to the amount of 20,000*l.*, 50,000*l.*, or 100,000*l.*, when, upon the partnership having ceased to carry on business, the affairs are in the process of being wound up; and when the balance is struck, the debt may be reduced to one half, or to one third, or to nothing; and because the debtor cannot find sureties to the full amount of the debt which is sworn against him, a fiat must issue? [The CHIEF JUDGE:—That would have been the case if he had made the ordinary affidavit for holding to bail, and he had gone to prison because he could not find sureties for the amount, and had laid there twenty-one days. The same consequence would follow from exactly the same sort of affidavit.]—Mr. *Stubbs* was not justified in making an affidavit of that kind, because they are themselves now winding up the affairs of that partnership. [Sir *John Cross*:—It is trying the validity of the debt, with which, with reference to this affidavit, we have nothing to do.]—Suppose, for an instant, that there was no question as to the amount of this debt, and we were not entitled to deduct the two bills of exchange

of 5,000*l.* and upwards, still it is quite clear, admitting there was this debt of 15,000*l.*, that when the affairs are wound up there must be something coming to Mr. *Hall* in respect of these 1,455 shares. Therefore, was it fair for them to make an affidavit that he was indebted to them in the sum of 15,000*l.* and upwards, when they knew that upon the affairs of this copartnership being wound up there would be a counter demand? [The CHIEF JUDGE:—All you had to do was to give a bond, with two sureties, not to pay 15,000*l.*, but to pay such sum as could be recovered in an action at law.]—This clause is exceedingly oppressive upon individuals, and, being so, the Court will not carry the construction further than the words compel them to do; and, as Lord *Eldon* says, “that if there are, in acts of parliament giving an extraordinary remedy, certain forms which shall be complied with, and the Court finds the absence of those forms, or that the affidavit is not in the form which the spirit of the act requires, then the Court will not allow its process to be issued upon such an affidavit.” [The CHIEF JUDGE:—What is it that this act of parliament requires in the affidavit that is not in the affidavit in this case?—The affidavit must be filed, and must be in such a form that an indictment for perjury could lie upon it; otherwise it is not an affidavit. [The CHIEF JUDGE:—The act of parliament is very loosely framed with respect to the affidavit; it does not say where or before whom it shall be sworn. Before whom do you say it ought to be sworn?—As it only says where it shall be filed, it must be implied that it is to be sworn where it is to be filed. We will say it is to be filed in the Court of Bankruptcy, and then the inference is, that it must be sworn in the Court of Bankruptcy. Now it is sworn before a master extraordinary in chancery. [The CHIEF JUDGE:—What

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Quare, before
whom the affi-
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must be sworn
If before a
master extra-
ordinary is
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authority, according to your argument, could the Court of Bankruptcy have to take such an affidavit? The commission is not issued by the Court of Bankruptcy, but by the Lord Chancellor.]—Strictly speaking, no doubt it is so; but your Honour knows very well that, practically, it is issued from this Court. Although the Lord Chancellor issues the commission, still the Lord Chancellor issues the commission sitting in bankruptcy; not as Lord Chancellor, but as one of the judges of the Court of Bankruptcy. He does it under the authority given him by the legislature. When he executes his fiat in bankruptcy, he is sitting in bankruptcy; it is an act done in bankruptcy. When the Lord Chancellor exercises any powers given to him by the law relating to bankruptcy, in the exercise of those powers he is so far exercising the legislative power given to him by the name of Lord Chancellor, but in the capacity of a judge administering the bankrupt law. Now, this affidavit not being entitled in any cause or matter, nor entitled in any court, no indictment for perjury could lie upon it. [The CHIEF JUDGE:—Where do you say it might be sworn so as to support an indictment?—Inasmuch as the section is silent as to any court where it shall be sworn, it is a strong circumstance to show that some court is required; because, in the act relating to members of parliament it states the court where it shall be sworn, and that act of parliament says it shall be filed in the Court of King's Bench at Westminster,—sworn and filed; and in *ex parte Harcourt* (a) the affidavit was sworn in the Court of King's Bench. [Sir John Cross:—It must be before an officer of that court.]—That act, 6 Geo. 4. c. 16. s. 10., provides that the affidavit shall be sworn in a particular court. It enables the person

Quære, how an affidavit under 1 & 2 Vict. c. 110. s. 8. is to be intituled?

(a) 2 *Rosc.* 203.

aggrieved by the consequences of that affidavit to indict for perjury. There is an instrument which is not entitled in any court, which is entitled in no cause and in no matter. Is that an instrument upon which an indictment could lie? [The CHIEF JUDGE:—In what cause could it be? I want to see whether your argument is, that this clause in the act of parliament must be a dead letter.] — It might have been intituled, “In the matter of *George Hall*, against whom certain proceedings are intended to be taken, pursuant to an act, intituled ‘An act for the abolition of arrests;’” — any title which would identify the matter in respect of which the affidavit was made. Because, in indicting for perjury, it is not enough to show that the facts sworn to are not true; you must show they were relevant to the matter; it must be known that it is relevant to the matter at issue between the parties. That is for the purpose of showing that the person who made the statement did it not carelessly and inconsiderately; but, inasmuch as it was material to the issue between the parties, he must be supposed to have done it maliciously, and with a view to some advantage to be taken. Now, how is it possible to show, in the face of his affidavit, that it was material to any question between Mr. *Hall* and the other persons that any statement therein was relevant, when the affidavit is not entitled in any court, nor entitled in any matter whatever?

Then, if they could swear it before a master extraordinary in chancery, why could they not have done it before a magistrate? They might have sworn it, according to their own doctrine, before any person who was competent to take an affidavit. A magistrate is competent to take an affidavit for several purposes. [The CHIEF JUDGE:—Not for this purpose.]—If a magistrate is not competent for this purpose, why is a

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Quare, whether
an affidavit of
debt under
1 & 2 Vict.
c. 110. s. 8.
might be sworn
before a magis-
trate?

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tary affidavits
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trates.

master extraordinary in chancery competent? What has a master extraordinary in chancery more to do with taking an affidavit than a magistrate? [The CHIEF JUDGE:—Is there not an express act of parliament disabling magistrates from taking an affidavit, except in matters officially before them?] (a)—There are many acts of parliament which, for the purpose of verifying documents, as those upon which government offices pay money, provide the affidavit must be sworn before a magistrate or a master extraordinary in chancery. It does not enact that each magistrate shall be allowed to administer such an oath; it is taken for granted that it may. We contend that it is to be inferred that if it is filed in the Court of Bankruptcy it must be sworn there also. [Sir John Cross:—The meaning of that is, that a man must come out of Northumberland to swear his affidavit in Guildhall.]—Yes; it is an extraordinary and special remedy given, if they choose to avail themselves of it; and it ought to be compulsory upon them.

Quære, whether the affidavit under 1 & 2 Vict. c. 110. s. 8. must be sworn as well as filed by the creditor?

The act only states that the creditor shall file, not that he shall make the affidavit.

Then the act states that the affidavit must be sworn by a creditor. But it does not appear upon the face of the affidavit that Mr. Stubbs is a creditor; he merely swears that he is a public registered officer of this company; he does not swear that he is a shareholder; he swears that Mr. Hall is indebted to the company, but not that he is indebted to him and the other members of that company. The act says that the affidavit shall be made by a creditor. [The CHIEF JUDGE:—It does not state that the affidavit shall be sworn by a creditor, but that the creditor shall file an affidavit. By inference, when it comes to a subsequent part, when it says "he or they," you may infer it.]—Your Honour will observe, that so strict did Lord Eldon think, in *ex parte Har-*

(a) See the 5 & 6 W. 4. c. 62, *post*. Appendix.

court (a), that the forms ought to be complied with, that the affidavit in that case merely describing Mr. *Harcourt* as a member of parliament, Lord *Eldon* says "that is not sufficient, for when you come to make an affidavit, the consequences of which are penal, you must have every allegation distinct;" and he says, you ought to have gone on to swear he was a member of parliament; merely describing him as a member of parliament is not sufficient. So here it does not appear that Mr. Stubbs is a creditor. [Mr. *Wightman*:—The act requires that a public officer should be a member of the copartnership.]—Be it so; that is not sufficient; he ought to have sworn that he was. The act of parliament may require it, and he may have been appointed a public officer in contravention of that act of parliament. According to *ex parte Harcourt (b)*, he was bound to have stated distinctly on the face of the affidavit that he was a creditor. Lord *Eldon* goes on to say that the affidavit ought to have stated distinctly all the allegations which would bring the individual within the clause of the act of parliament.

Then the statute says, that the affidavit should be filed in her Majesty's Courts of Bankruptcy. Now what did the legislature mean by Courts of Bankruptcy? As your Honours thought it was so requisite to give a construction to all the words of the act, the Court will apply the same rule here, and give a construction to the letter "s"; and, inasmuch as the bond is to be given before a commissioner of the Court of Bankruptcy, the intention was, that this affidavit should be filed in the court of the commissioners, because the commissioners do take affidavits, and they file affidavits. It seems reasonable, inasmuch as the commissioner is the person who is to approve of the bond and of the secu-

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the affidavit un-
der 1 & 2 Vict.
c. 110. s. 8.
should be filed
in the court of
commissioners
of bankruptcy,
or with the
registrar?

(a) 2 *Rosc.* 203.

(b) 2 *Rosc.* 211.

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rities, that the affidavit should be sworn and filed in his court. That has not been done. It is filed with the registrar; and is sworn before a master extraordinary in chancery. We say that it ought to have been sworn also before the registrar of the Court of Bankruptcy. Then, in *ex parte Harcourt*, Lord Eldon (a) held, that the commissioners who adjudicated on the bankruptcy ought to have satisfied themselves that all the circumstances required by the act of parliament to constitute an act of bankruptcy should have been proved before them. Now, whether all those circumstances have been proved before the commissioners under this fiat it is impossible for us to say, because those proceedings are *ex parte*.

Can there be a harder clause; because, although we have given securities, which, in the estimation, we say, of any unprejudiced and impartial third person, would be amply sufficient for the security of this debt, namely, by assignment of all our shares, not only in this company but in other joint stock bank companies, and also an equitable mortgage of property in Manchester, yet it is competent to creditors to allege, if there is a security of 100,000*l.* to secure 10,000*l.*, that is a security with which they are not satisfied, although at the same time they are taking proceedings against us both at law and in equity to enforce that demand. Then the Court will also satisfy itself that there is evidence that the bond has not been entered into. All that evidence must appear before the commissioners. [The CHIEF JUDGE:— You yourself state in your petition that you have not entered into such a bond.]—That would not be sufficient according to the doctrine of Lord Eldon. [The CHIEF JUDGE:— It would be sufficient for us not to supersede

(a) 2 Rose, 203.

the commission.]—The Court will satisfy itself there has been that evidence which the clause requires.

Then there is another point. Certainly it has not yet been decided that a person merely holding shares in a joint stock bank of this description comes within the true spirit of the act of parliament, so as to subject him to the bankrupt laws. And in *ex parte Brundrett* (a) one of your Honours pointed out the mischiefs which would arise from such a construction being given; namely, to hold that any person who becomes a shareholder in one of these companies immediately becomes subject to the bankrupt law.

But there is another point; namely, that although it was intended to carry on this company pursuant to the provisions of the act of the 7th Geo. 4th., yet in fact they did, in contravention of the express stipulations of that act, establish a banking office in London; and there, in the name of Mr. *Cassells* their agent, they carried on the business of bankers, and in contravention of this particular act of parliament, and various other acts of parliament conferring exclusive privileges on the Bank of England. That is a fact which is not denied, and which cannot be denied; and the petition states we are advised that by reason of their having done so they are not entitled to sue in the name of their public officer. (b)

Now the act of the 7th George 4th “ provided that such corporation or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London.” The clause enabling joint stock bank companies to sue

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Quære, whether
a shareholder in
a banking com-
pany is a trader
as such?

Quære, whether
a banking com-
pany established
according to
7 Geo. 4. c. 46.,
but afterwards
opening a house
of business of
London con-
trary to the act,
is debarred of
the power given
by the act to
sue by their
registered
officer?

(a) 3 M. & A. 50.

(b) See *Guthrie v. Fisk*, 3 B. & C. 178. 5 D. & R. 24; 3 Stark. 53. *Ex parte Bank of Ireland*, 1 Molloy, 261.

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in the name of their public officers provides that joint stock banking companies carrying on business pursuant to the provisions of this act of parliament, and those only, shall be so entitled. [Sir John Cross :—How can you make that a condition precedent to the existence of the company?—Because the act of parliament makes it so. [Sir John Cross :—How can it be precedent? They could not carry on business in the city of London before they got a company.]—There is a previous clause, in which the Bank of England only consent to give up their exclusive privilege upon condition of the company carrying on their business pursuant to the provisions of this act. [Sir John Cross :—If they did carry it on against that proviso, they would be liable to be called upon to account to the Bank for having done so. Unless you can show it is a condition precedent to the existence of the company it can hardly be carried to the extent you are contending for. This was a lawful company until they did this wrongful act. That is quite clear.]—Yes; and they ceased to be a lawful company the moment they established a banking office in London; they carried on business in contravention of this act of parliament, and were an illegal body. They have not only no right to sue, but in point of fact they were altogether an illegal company. [Sir George Rose :—You were a member of it.]—Yes; but the circumstance of being a director will not in the least prevent us availing ourselves of our legal rights. [Sir George Rose :—It is hardly worth while pursuing that, because you are completely answered by your own petition. You are at liberty to make what you like of it at law, but it would be an answer to your own petition.]—With great deference, the case is much stronger in *Guthrie v. Fisk* (a), and yet the court of common law held they were not

(a) 3 Barn. & Cres. 178; 5 D. & R. 24; 3 Stark. 153.

estopped by that circumstance. Then if this Court, which is constituted a court of law as well as a court in bankruptcy, decides the question against us, they will give us all that benefit which we could have had in a court of law. [Sir George Rose :—The Court will give you every benefit which the circumstances raise in your petition. I am anxious to hear you address yourself to one part of the petition which is very strong indeed, and upon which I should like to hear something; the objection to the act of bankruptcy. With reference to the mode in which it is put in the petition, it seems to be a pretty clear act of bankruptcy. What I want to have considered is this :—It seems that as far back as the month of May these same parties filed a bill in the Court of Exchequer, which bill proceeded upon the statement, that the plaintiff is entitled to sue for this company; that there is a copartnership existing, in respect of which copartnership accounts are subsisting, and a balance of 17,000*l.*; that they held securities for that; they pray an account; they pray a sale of the property; and they pray payment of the balance out of the proceeds of the property, taken on the basis of the accounts between these parties; and in that suit they force the defendant by attachment to answer, which answer is put in, and that suit is still pending. In the month of October they discontinued the former action at law, they having commenced an action in the Court of Queen's Bench, which action would be a more ordinary proceeding in the Court of Exchequer to have it disposed of there. Whether it was for the same subject matter I do not know. In that state of things, Mr. *Stubbs* files an affidavit in the Court of Bankruptcy, which affidavit affirms, that upon a statement of the account there is a balance due to him in respect of the copartnership. Now it is not put, or intended to be put, that if there

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had been any act of bankruptcy Mr. *Stubbs* would not have been perfectly right in taking out a commission. What then I would have you consider is this,—whether, when this suit was pending, Mr. *Stubbs* could himself create his own act of bankruptcy, by an affidavit, going upon the very state of accounts in respect of which he has invoked the equitable jurisdiction, and make that act the ground of an act of bankruptcy against the defendant in equity. It is but a circumstance in that view of it; it may or may not turn out to be true. It would not alter the view of the thing, supposing it did not come up to the statement in your petition. You assert yourself to be thoroughly solvent, and that there is no other creditor except the person who takes the fiat out. If it does not come up to the fact it makes very little difference; but if it does it is a circumstance which is very strong. It would be a very strong proposition, to say that a commission would stand on an act of bankruptcy so created.] —They have instituted a suit against Mr. *Hall*, for the purpose of taking the partnership accounts, and to recover the balance found due. Mr. *Hall* is perfectly willing that that suit should proceed, and to meet them in a fair way. He does not dispute their right to the shares, nor does he or Mr. *Moult* dispute that the company have a lien on the shares, but he insists that as between him and Mr. *Moult* the transaction is good; he says this:—“ Mr. *Moult* gave me two bills of exchange for a large amount, for above 9,000*l.*, and this sale between him and me is good, and there is a consideration for those bills. Those bills were entered to my credit at the time of the transaction, and I have been kept in ignorance till you delivered me an account. You credit me with them in the first instance; but now I find, when you deliver my account, you strike out those items of account, and you strike out the credit, and charge

Credit given to
Hall in respect
of *Moult's* bills
afterwards with-
drawn.

me with the whole amount." And in his answer in the Court of Exchequer he insists on the same defence:—"I am willing to pay you any thing which may be fairly found due between us." If the master, on taking the accounts, is of opinion that you are not bound to give me credit for those bills, I will pay you the balance; but till that is determined, you have no right, and it is an unjust proceeding, after having given me credit for those bills,—which were not removed from my credit till long after they became due, when Mr. *Moult's* circumstances had changed, and I had no longer a security,—it is not a fair thing that you should now withdraw them." But then this bill is filed on the 25th of May, and those proceedings are still pending. Under all the circumstances detailed, even supposing on the points of law the Court should not be with us, swearing as he does that he does not owe more than 5*l.* in the world, except this debt, and what he may be indebted to his solicitor,—looking at the securities,—looking at what may be coming to him upon the winding up of these affairs, those persons acting on behalf of the joint stock banking company have proceeded against this gentleman in a harsh, vindictive, and oppressive manner; and this Court, having the power of regulating its own process, will not allow a fiat so issued under these circumstances to be proceeded with. If the Court should on the first point of law have any doubt, we trust they will allow us to try the question at law.

The CHIEF JUDGE:—That you might have if it is not superseded.

At the close of this day's argument, as the Court would not be able to sit again till the following Tuesday, the 20th November, and the meeting for the choice of assignees was advertised for Monday the 19th, considerable discussion took place as to what should be

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done in reference to that meeting. Ultimately the Court decided that that meeting should be proceeded with, especially in order to test the truth of the petitioner's statement of owing no other debts than that claimed by the company, and to see what steps the company would take.

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It now appeared that the meeting for the choice of assignees, intended to take place on the 19th, at the request of the petitioning creditor, and on the ground of the pendency of this petition, was adjourned by the commissioners till the 24th instant; and by another memorandum of the commissioners it appeared that no creditors attended at that meeting on the 19th to prove, except the officers of the bank, who declined to prove pending this petition.

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Mr. *Swanston*, Mr. *Wightman*, and Mr. *Bacon*, for the Northern and Central Bank, the respondents:—

Credit given to
Hall clandestinely.

When the inspectors were appointed by the Bank of England, that which we charge to have been a clandestine transaction between Mr. *Hall* and Mr. *Moult* was first brought to light. It was in January 1837 that the directors first discovered the attempt of Mr. *Hall* to get rid of the 900 shares, and cast the burthen of them on Mr. *Moult*. The only officer of the bank who knew any thing of the matter was Mr. *Lyle* the accountant, whose duty did not connect him in any way with it. No entry was made in the company's books, except in a private note by *Lyle*. None of the forms required by the deed of partnership were observed, nor were the fees of transfer paid. The bill and note paid as a consideration by *Moult* ought to, and, if the transaction had been fair, would have gone into the bank to the credit of *Hall's* account; but this was never done. Finding this state of things

to exist,—this secret attempt, on the part of a director, to relieve himself of the responsibility which, as a director, he was bound to bear,—the inspectors refused to recognize the transaction. In January 1837 *Moult* and *Hall* had repeated meetings, the result of which was, that this transaction was completely undone. *Moult* received back the bill and the note. Nothing needed to be done in the books of the bank in order to make *Hall* appear to be what he was, as between the bank and him, and as between *Moult* and him, the owner of these shares,—nothing required to be done, except the correction of that entry which the officer of the bank had improperly made in the private book kept between him and *Hall*. That entry was accordingly corrected, and the regular course of business would have been to make a corresponding correction in the pass book; but *Hall* never would permit the corresponding alteration in the pass book to be made. In January *Hall* resumed the ostensible ownership in these shares; and in his own petition he states a document which then passed between him and *Moult*, dated the 23d of January 1837; the sum of which is, that in consideration of *Hall* having consented, as between *Moult* and *Hall*, to rescind the transaction, *Moult* will indemnify *Hall* against the consequences. And then, on the 21st November 1837, which is two days before the date of this letter from Mr. *Moult*, Mr. *Hall* executes the deed of assignment. The inspectors being appointed early in the month of January 1837, and looking into the affairs of the bank, it became necessary to bring before the bank the condition of these shares; and to inquire who was the owner of them. The transaction between *Moult* and *Hall* was previously a secret. *Hall* was then called upon as the owner of 1,445 shares; and, after an ineffectual attempt to obtain the ratification of the sale to *Moult*, he acknowledges

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his liability; he acts as owner; he only gives these shares as security for the debt, and takes from *Moult* an indemnity; and yet the whole of the case that has been argued, except the debt of the bank, consists in this, that *Mr. Hall* has not had credit for this bill and note, amounting to 9,000*l.* It is true, he does not bring into his petition this deed; but he does bring into his petition this indemnity from *Moult*, which would afford some warrant for such a mode of proceeding in this case.

As between *Mr. Hall* and the bank, there is an ascertained balance of 15,000*l.* and upwards; the minimum of the debt due from him is 15,000*l.*, and the extent beyond that remains matter of uncertainty. The bank, as your Honours have been told, was in a state of embarrassment and pecuniary difficulty. *Mr. Hall* had been an active director of the bank, and he was a large debtor at this time, as he still continues. It appears on the affidavit, that application after application was made to *Mr. Hall* to render this security available, and he would not do it; he refused the dividend warrants on the shares in other companies which he had assigned; he would not permit the trustees to receive a part of the dividends; in short, the security was rendered, by *Mr. Hall's* contumacy, utterly fruitless and inoperative to the bank, and it is so to this moment. The bank was then advised to take measures for compelling payment of this large debt due from their debtor, in order to enable them to pay what was due to their creditors. An action was commenced, but no sooner was it commenced than the bank learned that *Mr. Hall* intended to interpose a technical difficulty. Advice was taken, and the result was, the bank was advised the technical difficulty could not be overcome in the then state of the law, and the action was discontinued.

In August 1837 an application was made to *Hall* for

further security. This deed of January preceding having been fruitless, a further security was required; and accordingly, in August 1837, Mr. *Hall* deposited with the bank the title deeds of certain estates of which he was the owner. The security remained fruitless; no advantage could be got. Then the bank were advised to file a bill in the Court of Exchequer, in order to make that security available. The bank had, on the settlement of accounts, a liquidated demand of 15,000*l*. The bank always dealt with that as a liquidated demand, and proceeded with the account as between the bank and Mr. *Hall* entirely on that footing. They wanted ready money to discharge the debts of their creditors, and yet Mr. *Hall's* whole policy was to defeat the beneficial operation of the security which he had given. The suit was, therefore, instituted in the Court of Exchequer, as equitable mortgagees, praying a declaration that they were entitled to a security on the property for the whole amount which should be found due from *Hall* to them. It prayed an account of what should be found due from *Hall* to them, and it prayed the ordinary process of the court, a sale or foreclosure, in order to make the security available. Does that open the account? Does it annul the transaction between the parties? The object of it is to enforce the security on the real estate, and, as incident to that, to have an account taken. Why may not the account be taken upon this ascertained balance? On the ordinary reference to take the accounts there would be a declaration not to disturb settled accounts; there might be a case to surcharge and falsify, but that suit no more opened an account than it did if it had consisted of a bond for mere principal and interest. [Sir George Rose:—There has been a meeting held for the choice of assignees, and the commis-

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sioners have made a memorandum that no creditor proved, and that there has been no choice of assignees. How do you propose this account to be taken? With whom?—With the assignees. We were not bound to choose them yesterday. Put this case: Supposing it were now clear that *A.* was the only creditor that the trader had; that he, *ex concessis*, confessed *A.* was the only creditor, and the trader owes 10,000*l.*; or put it, that there is an unliquidated account between them; will any man say that if that trader commit an act of bankruptcy it is not competent to *A.* to issue a fiat because he is the only creditor?

Suppose he is a creditor, and his debt is in such position that he cannot vote in the choice of assignees, is that a reason why there should be no fiat? The fiat is valid. The mode of working it is only matter of arrangement. [Sir *George Rose*:—Supposing there had been any other act of bankruptcy, different from that which has been occasioned by your own act, holding this man to bail, and getting security, your proposition would follow into a state of circumstances under which you would be entitled to deal with him in bankruptcy. I have stated that again and again. The difficulty that presses me is, how far you can, in the pending suit which is going on, the object of which is, upon your own admission, to take an account of the debt, and release the securities,—how far you can create an act of bankruptcy upon which you are to put the whole train of bankruptcy into operation. You may take it for granted, that if there had been an act of bankruptcy independently of yourself, and not occasioned by yourself, you might have had a commission twenty times over if you had thought fit.]—Assuming it was competent to Mr. *Stobbs*, for this part of the argument, to issue this fiat, and that

he has proceeded regularly, there was nothing, either in the nature of the case, or the previous proceedings of the bank, which deprived them of that right. This suit in the Court of Exchequer was instituted before the statute of 1 & 2 Vict. c. 110. was passed. Neither the parties themselves nor their advisers, in framing that suit, or in addressing their attention to the rights of the parties, or the remedies which they sought at that time to invoke, could have foreseen the altered position in which they would stand a few months afterwards. In the manner in which this suit is framed it does very great credit to the skill of the pleader who framed it, for he has so exactly adapted his machinery to its purpose that it is impossible to raise a doubt with regard to the nature of the proceedings and the intention of the parties in that instance. It cannot be pretended that they were seeking to have a general account taken, and to open the account. They were enforcing a security; and, in order to enforce the security, it was necessary that an account should be taken; but there was nothing in that proceeding which varied the principle on which the account should be taken, namely, that there was a liquidated balance up to a certain point; that this gentleman having given an equitable mortgage as a security for the whole balance which was due from him, the ordinary remedy was, that there should be a declaration for a foreclosure and sale, and an application of that security according to one of the forms of proceeding towards the reduction of the balance; but there was nothing in that proceeding to vary the position in which the parties stood as creditors, with an ascertained debt. The suit being still depending, and, either shortly before or shortly after the answer of the defendant had been put in, the statute of the 1 & 2 Vict. c. 110. s. 8. passing, that provided a new

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act of bankruptcy; and supposing that all the requisites had been observed, and that there had been a good act of bankruptcy constituted, the question is, whether the bank was at liberty to take advantage of this act; whether they could, having regard to the state of the accounts between them, and having regard to what had been done between them, and also to the state of Mr. *Hall's* property, and the state of the other demand against him,—whether it was competent to the bank to take that proceeding against him, which this statute was designed to enable any of her Majesty's subjects to take. It is difficult to understand why there should be the slightest impediment. It is true that this is a new proceeding, but still it is not new in principle. There were many compulsory acts of bankruptcy; indeed the greater part of them were compulsory. The true theory of an act of bankruptcy is, that it must be compulsory; a voluntary act of bankruptcy is a novelty, and rather an inconsistency. [Sir *George Rose* :—You must apply the same principle to any act of bankruptcy occasioned by yourself.]—Suppose, instead of this act having passed, the law of arrest had remained, it is quite clear the pendency of the suit would not have prevented the bank arresting this gentleman, and proceeding at law. [Sir *John Cross* :—You could not have arrested him as the law then stood.]—Supposing imprisonment for debt had not been abolished, and the law of arrest had remained, it is quite clear it would have been competent to this bank to arrest this gentleman; if he had not been in a condition to provide bail, and he had laid in prison the proper time, there would have been an act of bankruptcy; and what would have prevented the issuing a fiat on that act of bankruptcy? [Sir *George Rose* :—It strikes me that the instance you put is the same instance which you are dis-

cussing here. If you had arrested him upon an account, and you were at the same time proceeding for the balance of account, — your alleged balance,—you would have excluded him from getting bail, and have driven him to an act of bankruptcy. It is the same question which we are discussing here. The defendant says, you are proceeding in a court of equity, and therefore it is to be assumed against you that it is an equitable debt. You say that you have security for your debt, which being realized, will reduce your debt, and leave it a matter of account between you. You then take upon yourself legal proceedings, to say that the balance of that account is an amount which excludes his giving security for that debt. That is the way you drive him to an act of bankruptcy.]—We do not come to a court of equity merely because it is an equitable debt. [Sir George Rose :—I do not say you do, but being there it is an equitable debt.]—We came there to make the security available for the legal and for the equitable debt. There is no estoppel to prevent us saying, that ours is a legal debt. We have a security, for which we want the aid of equity, and come to a court of equity for that aid. We also apprise the court, that in addition to this legal debt we have an equitable debt, and then, according to the process of that court, its officer would be instructed to ascertain what is the amount due to us, not changing the character of the debt. There can be no doubt in the case put. The arrest is either unlawful, or it is a foundation for an act of bankruptcy. If it is an unlawful arrest, then there is no act of bankruptcy. No one will say it is an unlawful arrest. If it is a lawful arrest, there is an act of bankruptcy. Whoever heard, where there is a good act of bankruptcy, a fiat was to be superseded because that act of bank-

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considered in
the view of its
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of the process of
the Court or
otherwise.*Quære*, whether
a partner having
filed a bill
against his co-
partner to take
an account has
not elected his
remedy, and pre-
cluded himself
from suing out
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7 G. 4. c. 46.
and 1 & 2 Vict.
c. 96.

ruptcy had been compelled by legal process to enforce the demand of a legal debt? That is this case.

Supposing an application had been made by the officer of this company, and there had been the ordinary absenting or denial, can any one deny that is an act of bankruptcy? [Sir George Rose:—I wish you would address yourself to the difficulty that presses me. I do not in the least challenge the validity of your commission, or your right to sue out your commission, with all its legal incidents. I only want you to apply the principle upon which the Court deals where the commission is looked upon as the process of the Court.]—Here is a fiat sued out, the legal validity of which is unquestioned. There is no case suggested of an abuse of the process of the Court; there is no case suggested of an illegitimate purpose. [The CHIEF JUDGE:—They suggest that your purpose was, not to get payment of your debt (for of that there could be no doubt), but for the purpose of displacing him as one of the trustees of this company, and also from being assignee under any other bankruptcy; that is suggested on the face of the petition; it is directly alleged as the sole ground for suing out this fiat.]

Sir George Rose:—I do not doubt in the least you will explain, and get rid of all the difficulty which presses upon you with regard to your commission. Conceding that it is a good commission at law, I want you to deal with the difficulty which presses upon me, as to its being an abuse of the process of the Court to suffer such a commission to stand. You have given a *locus standi* so to deal with it. You say yours is a legal debt; you come into a court of equity for a legal debt, dealing with equitable circumstances as affecting the legal debt. This legal debt, which you are so ende-

vouring to work out by the machinery of a court of equity, you are likewise proceeding to recover in a court of law. I believe I am stating the practice of a court of equity correctly when I say, that it would be a matter of course in that court to send it to the master to consider whether you are proceeding for the same matter, and if you were, you would be put to your election. If there was any doubt that that which you were proceeding for at law was for the same object as you were proceeding for in equity, unquestionably what you are proceeding for in bankruptcy is, to recover the whole amount of your debt, and to obtain an order to get your securities realized. Is not this Court, therefore, to deal in the same mode with a party who is proceeding for the same object in three different courts? I cannot put out of sight that you get into this Court, dealing with your equitable debt, which you make the subject of your equitable suit. That is one of the things which presses upon me. If it had stood where there was no other property but what was comprised in your own security it would place it beyond any doubt. I should like to know, before I give an opinion on such a state of things, who the other creditors are; because this Court looks at a commission of bankruptcy as a process, not of the petitioning creditor only, but the other creditors; because it is material to see what other creditors are to be benefited by the proceeding which you have taken here, having already two other proceedings directed to the same object. But if you are to go on here with regard to getting your property sold and your account taken, and if the state of the proceedings tells us that there are no creditors or other persons who have an adverse title to you, how is this commission to be carried on for the only object for which it can be fairly

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action, to prevent it, we have not the slightest intention of prosecuting it: it was only as incidental to the operation of the eighth section of the 1 & 2 Vict. 110. that that action was brought. [Sir *George Rose*:—We know nothing of that; we find the action has been brought.]—With regard to the suit in equity, if not commensurate with the fiat, it would be commensurate with an order upon the fiat to have the account taken with regard to that equitable mortgage, and to have it sold. Assuming the validity of this fiat, there can be no difficulty in the just administration of it; for if it should happen that the petitioning creditor is the only creditor, if it should happen that he votes alone in the choice of assignees, and if he chooses himself assignee, and if it should be most improper that that gentleman so choosing himself assignee should settle his account with himself, nothing can be more easy than for the justice of this Court to be called upon, and to interpose. The bankrupt, the party interested in the settlement of the account, would be undoubtedly heard in this Court to have such a regulation made that the accounts should be fairly taken. It is not necessary for us to trouble the Court with the argument that the nature of the debt is an unliquidated balance of account. [The CHIEF JUDGE:—Certainly not.]—Neither would the relation of partnership be any impediment to issuing the fiat. That is clear. There are cases from the time of Lord *Hardwicke*, and there are some cases in this Court,—*ex parte Grazebrooke* (a), where proofs were ordered, and an arrangement was made, with regard to some of the proofs, that the dividends should be paid. [The CHIEF JUDGE:—That was a question of proof.]—

(a) 2 *Dea. & Ch.* 186.

No doubt, but it is equally clear, that upon the legal foundation of proof the commission might stand. The case of *Flower v. Herbert* (a), before Lord *Hardwicke*, is the case of a petitioning creditor's debt. [The CHIEF JUDGE:—That is a case where the partnership had ceased before.]—Lord *Hardwicke* there says, “Besides, the debt of the petitioning creditor arises on account, which I know not how can be determined without taking that account, and which cannot be taken in an action at law. Under all the circumstances, therefore, I shall not let this action proceed to trial immediately.” Then he says, “A debt on account, though not liquidated, is a foundation for a commission of bankruptcy.” [Mr. *Anderdon*:—Not a partnership debt.]—A partnership debt would make not the least difference. Nothing can be more clear than that the relation between the parties would not prevent the issuing of the commission. [The CHIEF JUDGE:—To be sure it would, because then there would be only an equitable debt.]—The liquidation makes it then a legal debt. [The CHIEF JUDGE:—You are talking about an unliquidated debt. You are not keeping to the same point.]—There may be a liquidated debt, part of an unliquidated account, and the unliquidated account may or may not be an equitable debt, but will not prevent a part of that debt being a legal debt. [The CHIEF JUDGE:—If there is a legal debt to the amount of 100*l*. it will not prevent the party taking out a commission for that 100*l*. because there was a further unliquidated debt.]—That is what we contend for here.

Now we will call your Honours attention to the particular act of bankruptcy. In conformity with the requi-

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 of
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—
 Respondent's
 argument.

Act of bank-
 ruptcy.

(a) 2 Ves. 326.

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argument.

The affidavit,
whether it dis-
closes a suffi-
cient title in the
public officer
to sue?

sites of the statute 1 & 2 Vict. c. 110. s. 18., no difficulty has been presented with regard to that act of bankruptcy, except, 1st, the officer before whom the affidavit was sworn; next, the entitling the affidavit; and, 3d, whether Mr. *Stubbs* is an individual competent for this purpose to represent the bank. [The CHIEF JUDGE:—The point was, whether he appeared to be a competent person on the face of the affidavit; not whether he was so in fact.]—He swears “he is one of the registered public officers of certain persons united in copartnership by the name of the Northern and Central Bank of England, for the purpose of carrying on the business of bankers, under the provisions of and pursuant and according to the statute,” &c. What more could he show? [Sir *John Cross*:—Could he not say that his name was returned to the stamp office in pursuance of the act?—We apprehend he need not. The validity of his appointment does not depend on what is stated in the affidavit. It *might* depend on the return. [Sir *John Cross*:—This affidavit constitutes the act of bankruptcy; must it not then be as perfectly made out as any other act of bankruptcy that ever occurred, and must it not be at least as perfect an affidavit as any that was ever made? Look at the affidavit, and see if it discloses, on the face of it, either that this is a company within the provisions of the act, or that the individual who makes the affidavit is authorized pursuant to that act of parliament.]—He states the fact, that this is a copartnership within the provisions of that act. [Sir *John Cross*:—No; he says it is united “for the purpose” of being so formed; but whether they consist of more or less than six persons the affidavit does not show, nor that the list of members has been filed in the stamp office, prior to which they cannot carry on business. The act 7 Geo. 4. c. 46. authorizes the constitution of banking companies consisting of more than six

partners; but it requires, by section 4 (a), that before such partnership shall carry on any business they shall return to the stamp office, (among many other things,) a list of the names of the members, and a list of the names of all the officers being members, with a description of the offices to which they are appointed. Now does this affidavit show upon the face of it that this is a company formed pursuant to that act, carrying on business as such, or does it show that this party had his name returned as an officer of that society?—The description of plaintiff, in actions which are numerous under this statute, is such as is found in this affidavit. [Sir John Cross :—You must recollect this is for a different purpose. This is to create an act of bankruptcy.]—[Sir George Rose :—The only question is, whether, before the act of parliament, the description would have done to have held him to bail.]—[The CHIEF JUDGE :—It goes further than what has been stated. It not only states that he was one of the copartners, but that he was “duly constituted” for the purpose of suing on behalf of the copartnership. Does not that embrace all the ingredients necessary?—This is the ordinary form in actions at law; the affidavits are all in this form. [The CHIEF JUDGE :—The primary object of this affidavit is, not to establish an act of bankruptcy, but to compel the party to give security.] [Sir John Cross :—The act of bankruptcy could not have been good without that affidavit, and the act of bankruptcy therefore consists of two incidents; an affidavit of debt by the creditor, and a default in the debtor. The debtor’s default is admitted; but that does not give validity to the affidavit. The default being admitted, the act of bankruptcy depends entirely upon the sufficiency of the affidavit.]—It is not the frame of the affidavit, but its truth which is in question. No one

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(a) See this section, post, Appendix.

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doubts that he holds the required character. The only objection is, it is not sufficiently stated. If that which were not true were stated that would not give validity to the act of bankruptcy. [Sir John Cross:—It would at law, but not in equity, if it was untrue. But on the question of sufficiency we must examine if it would be sufficient at law, and deal with it accordingly. The company, by the affidavit, are *united* for the purpose; but do they *carry on business*, and are they *established* for that purpose? That might be said truly of three or more persons who had it in contemplation to form such a society.]—Your Honour will consider that the object of the affidavit is, not to compel an act of bankruptcy, but to induce the debtor to give security.

As to the other objections to the form of the affidavit, viz., the party before whom it is made, and the title, we understand the Court has already decided there is nothing in them.

The objection
that the com-
pany's business
was carried on
in contravention
of the bank
charter.

As to the remaining objection, that Mr. *Stubbs* was not the proper party to take this proceeding because the company carried on business in contravention of the act, as the Court has already observed, that it should do otherwise, was no condition precedent. The only statement as to what is called a contravention is this:—“that although it was first intended to carry on the business of the company pursuant to the provisions of the act, yet in the month of May 1835 the company established, and continued till February 1837, an office in Charlotte Row, London, where, by means of Mr. *Cassels* as their agent, and in his name, they carried on the business of bankers, contrary to the act, &c., and the petitioner insists, by reason thereof the company are not entitled to sue and be sued in the name of any public registered officer.” Surely the bankrupt will not be allowed to supersede the fiat on that ground, he having been an active director in the management of those

transactions. But, beyond that, the 3 & 4 Will. 4. c. 98. repeals that part of the 7 Geo. 4. The difference is between banks of issue and banks not of issue. Moreover, Mr. *Stubbs* was not appointed till after February, when it is supposed these illegal transactions took place. But there is no illegality as the law now stands. [The CHIEF JUDGE:—You are relieved from that part of the argument, as to its nullifying the whole proceedings of the company. It prohibits their doing it, and excepts out of the licence given to the company any power of carrying on business as bankers in London.] Mr. *Stubbs* is then a person properly authorized to represent the company. Under the 7 Geo. 4. c. 46. s. 9. he is, we say, the proper individual, and empowered to issue a fiat. It is said that we cannot take advantage of the 7 Geo. 4. If we could, then undoubtedly Mr. *Stubbs* is entitled to proceed, because that expressly authorizes the issuing a petition to found a commission. We are, therefore, compelled to resort to the act of 1 & 2 Vict. c. 96.; and they say that is not co-extensive in its operation. The first section, they say, applies only to “suits and actions, or other proceedings at law or in equity,” and that a petition to found a fiat is not a proceeding at law or in equity. [Sir *John Cross*:—Then the only way in which the question arises is this,—that the 9th section of the 7th Geo. 4. expressly says, that the officer shall be authorized to found proceedings in bankruptcy, and to carry them on, which this clause of the 1st & 2d Victoria omits to do. Now, the former act had given all those powers of bringing actions and suits in equity, and carrying on proceedings at law, yet nevertheless it superadds a power to the officer to prosecute in bankruptcy. The latter act, they say, does not give an authority to prosecute in bankruptcy as against a partner, and is therefore confined to proceedings at law and

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in equity.]—It is not so clear that we are not warranted in proceeding by 7 Geo. 4. c. 46.; for there is by means of that deed of January 1837 such a liquidation of the debt, and such a foundation of a right of action, without any reference to the subsequent suit, that it would be within the meaning of the ninth section. [Sir *John Cross*:—The argument is, that the 1 & 2 Victoria gives to the officer no authority, except merely to represent the parties in suits at law or in equity, and other proceedings.] —But we submit, in the first place, that under the act of the 7th Geo. 4. it is competent for us to proceed; and the words of the act of Victoria are alone sufficient to warrant the officer in becoming a petitioning creditor upon a fiat. It seems in the recital, that that act in a very concise manner summed up the operation of the ninth section of the 7 Geo. 4.; and the manner in which it is summed up is, that it represents the former act to have enacted that all actions and suits against any persons who might be at any time indebted to any such copartnership, carrying on business under the provisions of the said act, and all other proceedings at law and in equity to be instituted on behalf of any such copartnership against any persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to any such copartnership, or for any other matter, and so on, should be taken by the officer. But that certainly would be a very incorrect summary of the enactment in the former act, unless the words are understood to include the proceedings in bankruptcy, which they very well may, because if we are to read proceedings at law or in equity as including proceedings in bankruptcy there is an end to the question. That we are warranted in so reading them, unless there is some very strong reason to the contrary,

Guthrie v. Fisk (a) is an authority. In that case there had been a private act of parliament, the words of which were very strict and particular, and after reciting the constitution of the insurance company, it was enacted that all actions and suits to be commenced or instituted by or on behalf of the said society, against any person or persons, or body politic or corporate, should and lawfully might be commenced or instituted and prosecuted in the name or names of the secretary or secretaries for the time being of the society, as the nominal plaintiff or plaintiffs, for and on behalf of the society, and so on; and the converse proceeding might be instituted against him or them. How? As defendant or defendants. But are not proceedings at law, actions and suits where they are to be plaintiffs and defendants? Now, before that case came before the court of law it was before Lord *Eldon*. (b) Lord *Eldon's* attention was called to that very point; and his Lordship says, "Looking at the section of this act in which the power to bring actions in the name of the secretary is connected with the words plaintiff or plaintiffs, it might seem difficult to extend it to the taking out of a commission of bankruptcy; but I wish that question to remain open at law, unprejudiced by my acceding to the prayer for amendment." So that no one can doubt that Lord *Eldon's* impression was, that unless those words, "actions or suits," had been connected with the word "plaintiff," they were meant to include proceedings in bankruptcy. But, when the attention of the Court of King's Bench was called to this case, it is manifest throughout that their Lordships proceeded upon the particular intention of the legislature. They did not mean to lay down

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(a) 3 B. & C. 178; 5 D. & R. 24; 3 Stark. 153.

(b) *Ex parte Guthrie*, 1 G. & Jam. 245.

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 argument.

any definition of terms, and to lay down what was to be included or excluded according to technical accuracy of speech, but meant to put a particular construction upon a particular statute; all they did was, to hold that the private act, giving power to the secretary to bring an action or suit as a plaintiff, or to represent the company in an action or suit brought against them as defendants, did not warrant his appearing as petitioning creditor in bankruptcy; but it is quite clear Lord *Eldon* thought that even those words would have been sufficient, unless they had been qualified. [The CHIEF JUDGE:—The objection in that case was, that the officer was not authorized by that particular act of parliament to represent the company as petitioner for proceedings in bankruptcy. The 7th Geo. 4. expressly gives to the officer of the co-partnership banking company under that statute power to be a petitioner. And then there would still be another question, not as to his being the proper person to represent the company, but whether the company, by themselves or their officer, could sue out a commission of bankruptcy, or effectually prosecute an action at law, under the first section; and the act of Victoria is to relieve the company from those difficulties.]—Precisely so; and your Honour having so put it we do not think it necessary to trouble you further on that point, and trust your Honours will be of opinion that there is no warrant for this application to supersede the fiat.

The reply.

Mr. *Anderdon* in reply:—

The word “proceeding” in that part of the act refers to the consequences of actions, namely, execution, and those other legal consequences to which that clause expressly applies. It is therefore in vain to say that you can apply it to a commission of bankruptcy. The words of the act of parliament are, “suit or action, or other

proceeding at law or in equity;" and I have the great authority of Lord *Eldon* for laying down the proposition, that a commission of bankruptcy is a proceeding *sui generis*, which can only be authorized in its consequences by express and specific enactments. Is there not to be any set off in respect of the right this gentleman has to contribution from the other members, or to an account of the share of profits? That is not contended; and yet, if the conclusion is to follow, in this or any other bankruptcy, supposing the fiat to have been sued out by a stranger, the proposition is, the bank may put down 15,000*l.* on account of their debt, without giving any account for his share of the profits, or showing that the other members of the society have contributed as they were bound to do. From the words of the fourth clause (a) of the 7 G. 4. the statute contemplated a difficulty supervening from dealing in bills of exchange, or in banking accounts, independent of the general accounts between partners. The inconvenience to be struggled against was, that the principal part of the business of these joint stock bank companies was carried on through the medium of accounts kept by their own proprietors and shareholders. Then the state of the law arose under the former act of parliament, that a company could not sue their partner at all. What was the obvious good sense of the statute? That in respect of those transactions in regard to their own individual members, where they are quasi customers, the company shall have the same rights as against their other customers; that in respect to discount of bills of exchange, or loans of money, they should not, in an action brought for those things, implicate the partnership account. But if the proposition contended for be correct, the com-

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(a) See the clause, post, Appendix.

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pany could come in, and insist upon proving their debt, without taking the accounts, which must be administered to arrive at the ultimate conclusion. This company have ceased to carry on their business as an operative bank from the very time when that deed was executed in January 1837. The words of the act clearly show, they must be a company in existence, and carrying on their concerns as a company; because the eighth (a) section of the 7 Geo. 4th, which is most material to this case, with reference to the affidavit, expressly empowers partnerships carrying on their business under the provisions of the act of parliament. Therefore, where do we find in any one of these proceedings any allegation that the company are carrying on business? They are a partnership, so far as the relation is not dissolved between them until they have wound up their affairs, but they are not a partnership carrying on business under the provisions of this act, for they carry on no business at all. If, upon the construction of the act, the conclusion be, that a banking concern cannot sue out a fiat against its partner upon the foundation of the existence of an unlimited demand founding itself with reference to the capital, what a monstrous injustice it would be to allow Mr. *Stubbs*, who is the representative of many hundred persons, none of whom have contributed their quota to these shares, to enable them to prosecute Mr. *Hall*, for the purpose of making him pay, without showing that the other partners who are suing him have paid in their proportion? and yet, if the proposition be correct, either by proof under that bankruptcy, or by any other proceedings, they are to go into the bankruptcy, and administer this fund so that the accounts are never to be taken in the way I express. If they have a right

(a) See the clause, post, Appendix.

to sue out a commission for 15,000*l.*, they have a right to prove for the 15,000*l.* If the proposition be correct, the proceeding will exclude the possibility of doing more than going in and proving the debt, without the usual incidents of partnership debts following; namely, that you shall take an account. But it is a well known principle in partnership, not only that you cannot prove in competition with other creditors, but you cannot prove at all until you have taken the account and established the debt. Therefore these parties, having long ago instituted a proceeding which has for its object to take the account, and by the aid of a court of equity to make their securities available to the payment, why should this Court carry that matter further, and deal with it otherwise than upon the principle of a court of equity? It is a material circumstance to inquire whether the conduct of the party is such as entitled them to sue out a fiat; because the Court in many cases, as in *ex parte Harcourt* (a), will control these proceedings, and in all cases of partnership it will prevent a fiat going where it must work irremediable mischief. I fully admit, that if one man swears an affidavit against another, that he was indebted to him in 15,000*l.*, and he did not owe him 15*d.*, yet if that man lies in prison, and fail for twenty-one days to give security, no objection could be raised to that as an act of bankruptcy as to third persons, and that nothing would purge that act. But would any Court, upon a fiat sued out by a person who swore to a debt of 15,000*l.* for the purpose of creating that act of bankruptcy, tolerate such a proceeding for a moment for his benefit? He could not be permitted to take the benefit of a thing so fraudulent. The utmost extent to which they can hold this

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(a) *Ex parte Harcourt*, 2 Rose, 203.

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gentleman responsible is 5,000*l.* Their own admission is, that their securities are sufficient to meet the whole demand against Mr. *Hall*, with the exception of 5,000*l.*

There is another mode of contesting the value of this act of bankruptcy, and seeing how it would operate.

There is to be a mutuality. Of course, if he kept a banking account, or if, on the other hand, he held a bill on the general partnership, he might sue or be sued. But it is not provided here, that he should sue one of the directors, in a case like this, for his share of the profits, or his share of the capital. To effect that, you must take the partnership account. And so Lord *Eldon* has said, over and over again. All the incidents of partnership belong as they do to the most limited partnership. It was conceded by the other side, that the want of power to sue under the 7th George 4th induced them to discontinue that action. Under these short words, "whether members or otherwise," if they could not bring an action under this act they could not sue out a fiat. Nor does it follow, that because an action can be brought, therefore, impliedly, a fiat can be sued out. There is a technical rule in the court of equity, and in the administration of bankruptcy, requiring a legal right of action at law to constitute a debt. Thence it is inferred,—and the argument is built on that,—that because "a debt," or "a legal debt," in ordinary cases, is a convertible term with the right to sue out a fiat, *ergo*, it is a convertible term under this act of parliament to sue out a fiat, because you can bring an action. It would by no means follow, if the right to sue out a commission was incident to the right to bring an action, that a commission ought to have been sued out; but it was held in *Guthrie v. Fish* (a), for the purpose of taking a measure

(a) 5 D. & R. 24; 3 Barn. & C. 178; 3 Stark. 153.

so penal, and so full of consequences prejudicial to the partner, that an express enactment must exist. Unless the Court holds that the statute of Victoria goes beyond the particular object in view,—not only by reasonable but by necessary inference,—you must apply the same doctrine: that inasmuch as the whole right to proceed against parties is founded upon legislative enactment, you must find some express power to sue it out. A legal right might be founded upon the existing account, because an action of debt might be maintained; and it is every day's practice to bring an action for money had and received on an account stated, and you make out what you can in the matter of account. The mere circumstance of its being unliquidated has nothing to do with it. The question is, whether the relation of partnership is such that it excludes the right of action. No fiat sued out by one partner against another can be good either in law or equity. *Ex parte Harcourt* goes to both these points.

Now the last point is one which does appear to me to be free from difficulty or doubt. The fallacy, so often urged upon the Court by the other side, was, that this affidavit, under the act for abolishing imprisonment for debt, was an affidavit of debt, and nothing more than an affidavit of debt. That is not a just representation of the result of the act of parliament, because the affidavit is the very thing on which the act of bankruptcy must be founded. An affidavit of debt did not require to be sworn by a creditor; his clerk, or any body in a condition to swear as to his belief, was in a condition to make that affidavit, and to justify the arrest. But shall it be said that an act of parliament, which had particular regard to the welfare of the community at large, by abolishing what was considered to be most oppressive,—namely, arrest for debt,—should be considered as creating new and increased facilities, by creating an act

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of bankruptcy altogether different from the former? Every body knows affidavits of debt were usually met by bail being put in, in the first instance. The courts winked at that mode of proceeding, by reason of the hardship of arrest for debt; and when they came to the justification of bail, after a considerable lapse of time, then came the time when the question was raised as to the solvency of the parties. In this case the Court contemplates a judicial discretion to be exercised in regard to the sufficiency of the bail. The act of parliament provides expressly for giving sufficient security to the satisfaction of the commissioners; and therefore, in this case, upon notice given to the other party, they are to come before the commissioner, and question and investigate the sufficiency of that bail. I cannot, therefore, conceive for one moment that it could have been contemplated by the legislature. But it is sufficient for me to say, it is not by this act of parliament intended to make this a mere affidavit of debt: for what is it the statute requires? It requires that the creditor shall be the person to make the affidavit; "shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy that such debt or debts is or are justly due to him." Why "to him?" That is, the person making the affidavit. [The CHIEF JUDGE:—"To him."—That is the person filing the affidavit. "The creditor or creditors shall file, and the affidavit shall swear there is a debt due to him or them;" namely, the creditor or creditors who shall file the affidavit. The subsequent part is more to your purpose, where it says they shall swear, "he or they verily believe."—And by taking the whole context through, it contemplates that the creditor shall be the person moving. It is also a very great doubt whether this act does not require that the person shall be a *present* trader; because it does not speak of a person liable within

Quære, whether the 1 & 2 Vict. c. 110. s. 8. applies only to a person actually carrying on trade?

the meaning of the bankrupt laws, but of one who is a trader. I conceive that the affidavit, not entitled in any matter, and sworn before a master in chancery, is no affidavit at all. Take the analogy which I have heard to an affidavit of debt in ordinary cases. Now where would the affidavit of debt be sworn, and before what authority? In the court in which the action was to be commenced. And did any body ever hear, or venture to propound, that an affidavit sworn in the Common Pleas would support an action in the Court of King's Bench; or, to carry it still further, that an affidavit before the master in chancery would do? Clearly not. You must therefore make your affidavit in the court where the proceeding founded upon it is to take place. I admit it is not necessary that you should entitle it in the Court of King's Bench. That the cases show; and why? Because there is no proceeding initiated at the instant of time when you make it. Therefore I do not complain that this affidavit is not filed in the Court of Bankruptcy. Take it that this affidavit is sworn before a magistrate, or sworn before the judges of common law, would it be contended that upon that affidavit an indictment for perjury would lie? Incontestibly not; no more than an affidavit sworn in the King's Bench could found an arrest in the Common Pleas, which it is quite clear it could not. Now a master in chancery has no authority to take an affidavit any more than a magistrate, except that he takes it by virtue of a commission emanating from the individual in whose court those proceedings are taken. Hence the authority of commissioners both of chancery and courts of common law. They have a delegated authority, for particular purposes, of proceeding in those matters to take this kind of affidavit. In every indictment for perjury it is a material allegation, and every precedent avers, that he was duly sworn upon the holy gospel, and so on, and that the party before

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whom it was sworn had authority in that matter to take that oath. The magistrate would not have authority to take the oath. That will not be contended for a moment. If it can be contended that it is good before a master in chancery, it must be equally contended that it is good before a magistrate, because a magistrate has as much authority as the master in chancery. It was thought necessary, in framing the act constituting this Court (a), whereby a fiat was to be issued, expressly to provide that the affidavit should be made before a master in chancery. But there is no pretence for saying that that can extend by any possible implication to a proceeding entirely independent. Nothing is more familiar to us all than that an affidavit sworn before an incompetent authority is good for nothing; and it is material in this case, because, if a bad affidavit be sworn, it is a question of vital importance to the constitution of the fiat, since if an indictment for perjury could not be founded, of course the fiat could not be sustained. They are correlative terms. If the proceeding is to be initiated in a particular court, and the affidavit is to be filed there, it implies, *ex necessitate rei*, that it is there, and there only, that the affidavit is to be sworn.

With reference to the company opening an office in London, their not doing so is something more than a posterior condition in 7 Geo. 4.; it is a condition precedent, which is coupled and goes along with all the acts; and companies must comply with the two provisions, viz., that they shall not carry on business in London, and that they shall not have their establishments except at a distance of sixty-five miles from London. Again, I have called the attention of the Court, for another purpose, to the 9th section; it is to be a partnership carrying on business, &c. "under the pro-

(a) 1 & 2 W. 4. c. 56. s. 13.

visions of this act." There ought to have been in the affidavit an expression the effect of which alone would give them power to sue; because if they are not carrying on business under the provision of the 7 Geo. 4. c. 46., of course they cannot sue, because they must engraft that portion of the 9th section of it upon the statute of Victoria to make sense of it; they must read both together; and we cannot imply that the statute of Victoria meant to extend any interest.

If it be a requisite that he should sue, I give Mr. *Stubbs* credit for his cautious abstinence, in thus framing his affidavit, whereby he says, this company was originally constituted for the *purpose* of carrying on business; *non constat* that it ever did take one step to carry it on; but still less can it be inferred, from any sound reasoning, that it is now carrying it on. As to the idea of there being an estoppel because Mr. *Hall* was a co-director, that is not the question here; there is no such estoppel, because this is a pure question of law. It might as well be said, that because a party chooses to contract with a company, knowing there was a clergyman in the situation of partner, that that would have estopped him.

There are many cases which show that in all proceedings the word "duly" is not sufficient, when the imputation is a legal consequence. Therefore, if, without giving the particulars, for the purpose of your declaration, you aver that *A. B.* is "duly" authorized to sue, that is not enough; because you must show all the circumstances whereby the inference of language flowing from the word "duly" could clearly be established. I apprehend this affidavit of debt (*a*), stating the deponent to be *duly* nominated, &c., such officer to sue, &c., is mere waste paper; the word "duly" is a waste

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(a) *Ante*, page 263.

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word, thrown in, no doubt, *valet quantum*, as the phrase is, but at the same time not carrying with it any of those material ingredients which are always matter of averment, always lying within the knowledge of those persons who are to apply them. And I submit, that this is far from being a mere proviso within the words of the act of parliament. If any action or any indictment were to be founded upon this act of parliament, it would not be considered a condition subsequent, but a condition inherent, to be ingrafted on any pleadings as an obligation upon the party pleading.

The CHIEF JUDGE:—Though I entertain very little doubt upon the questions argued before the Court, yet, as it is a new case, and as there may be, perhaps, some difference of opinion upon some portion of it, the Court will take time to deliberate as to what judgment it will pronounce.

The case stood for judgment.

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The Court this day delivered the following order.
Sir *George Rose*:—

I take occasion to say, that the opinion which, upon the argument of this case, I entertained,—that the fiat was perfectly valid, that the trading was hardly disputable, that the petitioning creditor's debt was good, and that the act of bankruptcy was good,—I still retain; nor shall I consider it necessary to say any thing upon those points so raised, except as to a doubt (and I believe more than a doubt) entertained in the mind of one of my colleagues as to the validity of the act of bankruptcy. It is necessary that the view which I take of that part of the case should not be left in any doubt in the mind of the Court, as to the principle upon which I consider it ought to be guided.

I have already stated, that the question as to the trading not being good is a matter of very serious discussion. A case was alluded to in which this Court held, that a party being in copartnership in trade under one of these acts of parliament was not a sufficient ground to make him a bankrupt, as a trader (a), and it was disposed of, meeting it with the statement, that when a party had made himself a member of such a copartnership, with a view to found upon it as a trading a fiat in bankruptcy, it would not, upon an application at his own instance to maintain such a fiat, be considered a trading; yet I believe the Court did leave it in doubt in that case; but as against the party sheltering himself from the consequences of such a trading, at the instance of any other party, it was held to be a sufficient trading to maintain a fiat against him. That disposes of the argument upon the trading.

With regard to the petitioning creditor's debt, it was put properly and strongly by Mr. *Anderdon*, upon those objections, which now exist as strongly as ever, and which, independent of the act of parliament applicable to this case, would exist as strongly as ever, against a debt, constituted as this debt is, independent of the act of parliament, being made the foundation of a fiat as the petitioning creditor's debt. Nor would it be an answer to the objections so put, that instances have occurred and are daily occurring in which a partnership debt may be the foundation of a commission of bankruptcy. The proposition would be, (constituted as these parties are, parties with other people in a general concern, to which the debt is or is not due, independently of the act of parliament,) that a partnership like this never could stand in the relation of debtor and creditor of any individual, or in fact in any relation in which they could maintain a commission against him. We are therefore

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A fiat cannot be maintained by a party taking shares in a joint stock bank for the mere purpose of creating a trading to found a fiat, but it would be sufficient to maintain such fiat adversely against such party; *ex parte Brundrett*, 3 M. & A. 50.

(a) *Ex parte Brundrett*, 5 Mont. & Agr. 50.

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of necessity driven to the act of parliament, to see how far this fiat, which could not stand independent of it, is sanctioned by it. Upon that part of the case the argument seems to me to be reduced to this; namely, whether the act of parliament has used language which authorizes, upon a fair construction, that a company so circumstanced may, by their registered officer, have a commission of bankruptcy; and whether, if there be any doubt as to the operation of the language which the legislature has made use of, and the object of the act of parliament, and the remedy and benefit to be accomplished, the act does not require that that construction should be given to it.

Now, in that way of putting the test upon which the act of parliament is to be construed, it appears to me, that, in the first place, the remedy which was applied to the difficulty existing in the case of *Guthrie v. Fisk* would have gone a short way in removing that which the legislature intended to remove, if it had not given a commission of bankruptcy, not merely against a person who might not be connected with the company, but against a person who was a member of the company. The statute has made use of that circumstance as connected with the right of petitioning or with the right of suing; and it is a very short, but to my mind a very conclusive way of putting it, that the remedy to be applied, and the facility to be given to the recovery of debts by a company constituted as this is, must be very short of that which the legislature must be supposed to have intended to accomplish, if it did not remove a technical difficulty, merely by the effect of which a partnership was to be precluded from having a mode of recovering a debt against a member of that partnership. My opinion, therefore, is, that the act of Victoria enables the officer to have a fiat of bankruptcy against any of the members of the firm.

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c. 96. authorizes
the issuing of a
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The only other point that remains with regard to the validity of the fiat is upon the act of bankruptcy; and having looked into the proceedings, I feel no hesitation in saying that in my mind the act of bankruptcy is thoroughly and completely established *upon the proceedings*; that every requisite which the legislature required in order to create that bankruptcy has been attended to, although it might lie open to the observation that there is part of it proved by the creditor himself. In the first place, we know how that strict rule has been qualified by some recent decisions; and, moreover, nothing is proved by the creditor which would not at the same time, and to the fullest extent, be a legitimate inference from other evidence properly tendered to the commissioner. So far, therefore, as that objection would arise from what is put on the affidavit itself, it was only necessary to deal with two difficulties entertained during the argument. The first objection, though I confess I have never felt the weight of it, went to the title of this affidavit; and as to that the answer is obvious: that, although upon the construction of this act of parliament, looking at it as process, the act of bankruptcy is not a direct, but only a consequential operation in the case,—looking at it as process, it might have been intended that the affidavit should have been in the court where the action was actually commenced at the time, as there was in this case, or with reference to some action which this party had a *bond fide* intention of bringing at the time; but whether or not that was the intention of the legislature, it has given no positive direction as to the place where the affidavit is to be made or taken, and therefore it leaves it open to general principles to govern it with reference to the subject matter. The necessity of the affidavit being intituled upon a particular subject with

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reference to the purpose for which it was taken, never for a moment could be required in the instance of this affidavit, attending to the scope and operation of the affidavit itself. The whole effect of the title is comprised in its operation; and no person who was served with that affidavit, or whose attention was called to it, could for a moment mistake that it was an affidavit taken under the act of 1 & 2 Vict. c. 110. s. 8., and intended to operate for the purpose of that act. It had occurred during the argument, and I think the difficulty was removed by Mr. *Wightman*, that an affidavit taken before a master in chancery was not taken with that sanction and protection against perjury, and with that propriety of taking an instrument of so solemn a nature, which the legislature must be presumed to have intended. It was met at the time by an observation which appears to me to have its full and deserved force now, namely, that if this is to be looked at, as it may be, in direct operation, as part of the code of bankruptcy, and if you look at what the legislature has directed to be done with regard to the proceedings in bankruptcy, and, further, if you look at what is the analogous practice in bankruptcy with regard to the mode in which evidence taken before a master in chancery is received for all purposes in chancery, it did not require, I think, any further way of dealing with the objections so put, but to arrive at the conclusion that the affidavit taken before a master in chancery was properly taken. One would arrive at the conclusion by attending to the positive directions of the statute *in pari materia*. One would find that conclusion confirmed by attending to the long analogous and contemporaneous practice now ripened into law. I shall advert to another mode presently; but if we were left without any such clue to govern us as to the person who

was to take the affidavit, the principle which is furnished as in other courts with regard to holding to special bail would afford an easy solution. The cases I refer to are those where affidavits were made before a judge in Ireland, or before a consul, or officer abroad. It has been met by the objection, that this is not the mode in which bail ought to be taken or regulated; for in so serious and solemn a proceeding as holding a person to special bail there ought to be a regular and strict course pursued; there ought to be certain solemnities and securities given to the object of the proceedings, so that an indictment for perjury might lie if the affidavit prove untrue; and it is idle to say that this would be a proceeding upon which an indictment could be maintained. The answer given is open to this, that although there might be in strictness a difficulty of proceeding upon an indictment for perjury, there would be no difficulty in proceeding as upon a misdemeanor for an attempt to pervert the course of justice; and you cannot put it for the bankrupt that it is a process which is to be looked at as process tending to a fiat, which it is not,—but it is to be looked at in the strictest analogy merely as a substitute for holding to bail. The argument is put safely with regard to that protection which is to be deduced from an indictment for perjury, when it is put on the footing upon which courts have dealt with an affidavit taken in the mode to which I have adverted. When therefore this affidavit came before the commissioner, and upon that affidavit he was called upon to exercise the functions which the legislature has given him, I apprehend all that he would have had to inquire of himself would have been that which he did in this instance: Does this affidavit come to me with that character entitling it to respect as an assertion made deliberately and properly before a person who is competent,

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and is in the habit of taking these statements, and who is recognised in courts of justice? Does it come to me with that character which authorizes me to govern my discretion in acting upon it in the mode I am required to do by this act of parliament? I can only say, that if this affidavit so taken had come before me, called upon to discharge my duty I should have acted as the commissioner has done in this instance; I should have considered (without saying how far an affidavit elsewhere taken would induce me to pursue the same course)—I should have considered myself as safely acting under the duty imposed on me by the 1 & 2 Vict. c. 110. s. 8. in exercising the discretion which I was called upon to exercise with regard to taking the security,—upon that discretion which is given to me. How far any commissioner so called upon to exercise his discretion upon such an affidavit would have considered it within his jurisdiction or ministerial authority to consider all the circumstances which are now brought forward against this fiat, in order to mitigate that security which he was called upon to apply at the instance of the party asking for it,—or how far, those circumstances being called to his attention, he would have thought they deserved no mitigation of the security at all,—it is not for me now to say. How far he would have considered it right, in any case in which the severity of this affidavit is to be pressed to the conclusion of an act of bankruptcy, by means of the party being incompetent to give security to the required amount,—how far any commissioner may find it within the scope of his authority to look to all the equitable circumstances by which he might mitigate the amount of debt, whatever might be the result of the action, qualified by equitable circumstances, it is unnecessary to say further now than that in this case where it was called to the attention of the com-

missioner he considered it a case in which he ought not to act upon it, finding the security was an amount which the party was unable to comply with; and the result has been an act of bankruptcy.

Such, therefore, is the state of the law with regard to the individual who now seeks to supersede this commission; and, however circumstances may be pleaded in relation to the party who has brought him into that condition, I cannot help coming to the conclusion that, all those circumstances having induced that, by non-compliance with which an act of bankruptcy has been committed, there has been an act of bankruptcy, which may be made available by the party who thinks fit to make such an affidavit; but whether that party can make use of it is a distinct and different question. I intimated what was the inclination of my opinion during the argument; and I called Mr. *Swanston's* attention, in the discussion of it, to this way of putting it. Taking it as a concession that the fiat is perfectly good, then try whether or not there are not equitable circumstances by the effect of which, although it may be a good fiat, this Court will not suffer it to stand; and Mr. *Swanston* did, in that way of looking at the case, urge every circumstance which could palliate the equitable interference to cut down the legal right; and at the conclusion of the argument we left the case as a case in which, at all events, the party must elect whether he would proceed in a court of equity or in the Court of Bankruptcy. Under the particular circumstances of this case, and more so as the attention of the Court was challenged to it by the very pertinent observations of Mr. *Bacon*, namely, that if it was brought to a state of circumstances under which the Court call upon the parties to elect whether they will proceed in bankruptcy or in the suit in equity, the Court was

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bankruptcy not occasioned by the act of the bankrupt, why the bankrupt should not be entitled to come into court in order to get an election, upon the costs being paid. But I think there must be an essential distinction where it is a petitioning creditor with no act of bankruptcy supplied to him elsewhere, but an act of bankruptcy occasioned by his own act, where the effect of that act of bankruptcy is to induce a proceeding in bankruptcy, which proceeding in bankruptcy embraces and is a complete and effectual substitute for the whole suit that is going on in equity; and it appears to me that nothing would be more monstrous than that, as against a bankrupt, this Court should allow the proceedings to go on, and that the equity suit should be allowed to go on,—that both, in fact, should go on; and the election ought not to be accomplished upon any terms which would leave the solicitor to wait for the costs of that suit, which must be determined in one way or the other. Therefore it appeared to me, that if the bankruptcy is to go on, there must be an election to abandon the suit in equity, and that the bankrupt should be reimbursed the costs of the proceedings in equity. Upon turning the matter over in my mind, it does appear to me that to leave the parties to their election in this instance would fall far short of what the bankrupt is entitled to ask from us. If he tells us he will not be satisfied with the alternative, whether the suit shall be prosecuted in equity, or this commission shall be proceeded with, I have not the least hesitation in saying, upon those grounds which were adverted to in the argument, that this fiat must be superseded.

I am anxious to look at this case in that way of dealing with it; first, as abstracted of all those circumstances which I have adverted to as connected with the suit in equity, as a suit in equity in the state in which this suit

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is; and I likewise wish distinctly to look at it exclusive of all circumstances, namely, the progress of the commission worked up to the choice of assignees; and I wish to look at it as abstractedly as I can of all those circumstances, and to deal with it merely as arising out of the relation of the parties; and considering it in that way, it does not appear to me that I should be improperly straining the application of equitable principles against a legal right, in saying, if I dealt with it merely with regard to the relation of the parties, independent of the conduct of the suit in equity, or the circumstances which are furnished by the prosecution of the bankruptcy, that this fiat ought not to stand.

When this question was before the commissioner, with reference to the security to be taken, if all the circumstances were called to his attention, and he had considered the circumstances upon which the amount of the security was to be mitigated, namely, that here was a partnership account, upon which partnership account, or upon the dealings and transactions in respect of which, security was actually taken,—which security, be it recollected, is not a security to the parties working the commission, but a security to strangers not amenable to the commission, or within the commission,—whether his attention was called to that and other circumstances, and he said, “These are circumstances upon which I cannot interfere; I must positively act on the affidavit of 15,000*l.* being due, and you must find security to that amount,” the question here would have arisen,—this Court looking at it as an act of bankruptcy,—whether he had jurisdiction to interfere upon the equitable circumstances; and I think it would be difficult to say, that inasmuch as it was not done with an intention to prosecute the commission, nor does it follow from the party making this affidavit before the commissioner that

he means to go on to bankruptcy, and which is merely an incident, which may or may not be made use of for the purpose of bankruptcy,—it would be exceedingly difficult to say it could be made the subject of interference here, so as to restrain the party going on, in the mode in which he would legally have a right to go on, upon such a proceeding, and establish an act of bankruptcy. But if it was to be looked at upon general equity, I cannot help thinking that there are many circumstances which even in that way of putting it would entitle the party to the interference of a court of equity against such an affidavit being proceeded upon to the extent of making it an act of bankruptcy, or acting upon it as an act of bankruptcy. For, first, there is this deed, on which we are called upon to say there is a positive debt of 15,000*l.*, to which legal consequences are to attach. If the attention of the parties is called to that deed, it is no such thing. There is no debt created by this instrument to the bank. It is nothing more than a recital that that is the state of the account between the bankrupt and the copartnership; and that upon the state of that account, 15,000*l.* is owing, and property has been given as security for that 15,000*l.* There is no covenant which constitutes it a debt between this party and the bank. There is nothing but the circumstance in evidence, which by the effect of this deed regulating the accounts, and making this property available upon the taking of the accounts, is to raise an inference. I admit that the sum of 15,000*l.*, or a given item, is payable; but there is nothing which makes it a debt between this person and his copartners. And then I would say, if it got to the length,—without coming here upon affidavit of a fiat, by the effect of which fiat undoubtedly there would be jurisdiction to interfere,—if it had come here before it got the length which it has done now, and

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fiat, I should have been bound, on the principle upon which I cannot suspend the advertisement in the Gazette, to say I find all perfect upon the proceedings; and then I should assume, finding all perfect upon the proceedings, that there is an equitable ground upon which the Court will not suffer it to go on,—provided there are equitable grounds,—on which it will not suffer it to go on, although it is a perfectly fair proceeding. And now we will look at those equitable grounds.

The first mode in which it would be put is this:—The only way in which the party, being a partner, can take out under this act of parliament a commission of bankruptcy, and having taken out, as a partner, a commission of bankruptcy, can work it without being fettered by having the accounts taken so as to leave his petitioning creditor's debt standing upon the result of the account, is by the effect of that act of parliament, which, at the same time that it gives the officer of this company, as the petitioning creditor, a right to take out a fiat, excludes all set-off, or all taking of accounts which but for the second act of parliament might otherwise be had against him. I have brought it to this state of things, that the act of parliament which enables an officer of this company to take out a commission against a member of the company, as a petitioning creditor, would have been neutralized at the very point where it had got to the fiat actually taken out, by the effect that, being a partner, all the partnership accounts must be taken before the amount of proof could be taken under that fiat, and the only way in which that was cured was by the effect of a subsequent clause, in which all taking of account, and all set-off, was destroyed, and which leaves him to proceed upon his debt, whatever it may be. It is not putting the proposition too strongly, that it is competent for parties to contract for themselves under that

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relation in which they stand by operation of law; and then the first question would arise, whether, regard being had to this deed, the company here have not contracted themselves out of that provision against which the account was not to be set off, and have not, by the mode in which they have dealt with this petitioner and his property, of necessity let in, as against themselves, by their contract and conduct, the necessity of taking this account. If, therefore, they opened the case here, in order to stay the operation of this fiat merely upon this, it is quite true, that if nothing more had taken place between them he could not have called for an account in bankruptcy; for the legislature excluded him. But here you take, by two trustees foreign to yourselves, property which is still in your hands, upon the basis of account; of which property you have been entitled to receive the rents and profits since January, which are to go in liquidation of that account; and then I ask, how can you, having contracted to that extent, be entitled to set up the provisions of the act of parliament? I should at once say, if there was nothing more in the case than this deed, in which I find the property is conveyed to trustees, upon no covenant or acknowledgment of debt, but merely mentioning a given sum (always having that in mind), and that the whole provision of this deed is to accomplish the realization of this property upon an account taken between them, I should then say to the petitioning creditor, "You, the petitioning creditor, as a member of the partnership against a partner, and who are pressing me with the operation of the clause that no account shall be taken, I say you have contracted yourself out of that; and how can you do justice to this man, against whom a debt of 15,000*l.* is claimed, which is no debt to you, but only a debt connected with the security, without taking the account, and having the property

sold? And it is thus to be sold, and the commission worked; and therefore, when I find the relation between you founded upon an account covered by conduct connected with a security, it induces me to hesitate (I do not want to put it higher) whether it would not be my duty to supersede the commission." But it would unquestionably be the duty of my colleague, when he found the act of parliament so doubtful, to deal with it in this way:—"If I supersede this commission, I possibly take away the remedy of the assignees; but if I do not supersede it, the equitable circumstances not being strong enough, I retain the commission, with liberty to the bankrupt to bring his action."

In that way of putting it, and abstracted of the circumstances, and what I find to have been the conduct of these parties, I could not suffer this commission to go on. But it luckily does not leave the Court to the necessity of getting to that conclusion, because it was put, in addition to what I have already urged, "I am solvent; I am not only solvent, but I have no other creditor in the world." If that is pressed, the first answer is, "Your solvency has little or nothing to do with it; your alleged solvency is no answer to the commission; and as to your having no other creditor in the world, we have no mode of arriving at that, except in the regular way. If you do put it upon that, there is but one regular mode; let it go to the choice of assignees, which will regularly show us, first, whether you have any other creditor in the world, that is, any other who would come in under this commission, and, lastly, whether this commission, going to the choice of assignees, can work out a bankruptcy." And it does so happen that by accident, the Court not being called upon to interfere, it has gone on to that precise state of things to which the Court have wished it to go on, and it finds it realizing

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the proposition which the bankrupt tendered, and, it may be assumed for the purpose of this commission, that he is solvent, and that no other creditor will come in.

We have now, therefore, dealt with it upon a state of things in which, by trying to work out the commission up to the point of the choice of assignees, one has a right to draw the inference which the bankrupt tenders, namely, that there is no creditor who is a creditor for the purpose of this commission, and that, independent of the claim between him and the parties so working this commission against him, he is entitled to say he is solvent. I shall come back presently to the point where I leave it, up to the choice of assignees, as to the difficulty which I put in the working of this commission.

I shall now, having so far dealt with the relation of the parties in the state of debtor and creditor, and the interest which they took as connected with that relation, look at them in a case where the petitioning creditor has conceded to me that I have looked at this relation properly. I am not inferring from a probable state of things, whether that is the operation of law which, if I am entitled to argue from the relation of the parties, would be the operation of law; but by his own conduct and his own dealing with this bankrupt he has authorized a conclusion against him. First, I say, the conclusion of law that I have taken is the right conclusion, from abstract circumstances, and by his own conduct. He files a bill in equity; the bill in equity proceeds upon the relation in which the persons stand with him upon an account to be taken upon the realization of security, and the effectual relation in which these parties stand, to the full extent of that relation, to each other, and the property to be realized between them.

Now, before I go further, if the petitioning creditor has a remedy in bankruptcy as in a court of equity,

does he tender the same remedy to the bankrupt? If he comes here, and insists, "I want to have the bankrupt's property realized," how is he to get it by the machinery of this Court? If it be,—and it must be, and is,—a preliminary step to his proceeding in the bankruptcy, that the property should be realized, I should like to know how is this property to be realized by the machinery of this Court. And although I admit I am putting a difficulty which in practice amounts to nothing, because trustees would not set up a title as against a party for whom they are *cestui que* trusts, I have a right to put it as a legal argument, where the party stands upon his legal rights, and when the question is, how you are to deal with legal rights. I have a right to ask, when you tell me that you are only taking your legal remedy, and abandoning your equitable, in coming to this Court, where is the reciprocity? how do the bankrupt or the creditors get what they are entitled to? how can you stir a step? and supposing the trustees chose to come and say they would not act, how could we compel them? I should be glad, therefore, to know how such a state of things could be competent to discharge the relation between the parties. It is not so.

Now in that way of putting it, supposing the suit to be as I have already stated in equity, it was just as competent, the moment after that bill was filed as before, for the party, if he wanted the act of bankruptcy, to get it, as it is now. He gets the act of bankruptcy by his own act; he gets it by security not being given at the time. He could equally have got it before. When he found, the very moment after he filed the bill, that there was a *locus penitentiae*, he could have accomplished it then just as well as he can now. By the power of the Court he presses him to put in his answer; he gives him no indulgence; he brings the suit on in the court of

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equity; where, as against the defendant himself, and where, unless from some neglect of his own, the suit is in a condition to be set down, and go to the master to take the whole of the accounts, and give the bankrupt every shilling which he has contracted he should have upon the taking of these accounts.

Now I ask, if that is the state in which I find these parties placed by a suit in the court of equity, if a man was going on in his action at law, whether it is a case in which the Court would say, "This is a case of election;" because that would carry it back to where I left it, — whether there was to be an election. If there is a suit proceeding upon securities directed to an account where the securities would be realized, and in which the balance is to be ascertained, and then a party goes to law, would the defendant in that suit be content to say, It is a case of election? I put the rule in bankruptcy upon this, and upon this I am willing that my opinion should stand or fall; whether, in the state into which I have brought these parties now, if the party thought fit to file a bill for an injunction, whether the whole subject in litigation would not be transferred into a court of equity. I will repeat the proposition, because unless I am sound in my conclusion I am wrong in the principle which I am applying to this commission. Would not the defendant in that suit have been entitled to say, This is a subject, not of election, but properly within the jurisdiction of a court of equity? And, *a fortiori*, in the state to which you have now brought it, unless I am sound in that conclusion I disavow the principle upon which I supersede this commission. But I think I am sound in so applying it. Yet I should be sorry, in a case where I believe we have not all come to the same mode of viewing it, that it should be left there. I have not the least doubt, as to what I ought to do, if

I was left to act upon my own judgment and my own opinion, to the extent to which I have now argued this case, namely, that I ought to supersede this fiat.

But that is not all. I apprehend I have to look, in suffering this commission to go on, whether or not it can be worked as a commission of bankruptcy; yes or no. And I would be glad to ask how, with reference to what is to be done in administering property in this Court, — how this commission can be worked as a commission of bankruptcy? I have already adverted to the fact, that there has been no choice of assignees, not only at one but two meetings; and we are told by the record of the commissioner upon the proceedings that the assignees cannot be chosen, because there is no person who can choose assignees under this commission. When we parted with this upon a former occasion I intimated to the petitioning creditor that I thought it must go to the choice of assignees; and that it was his duty as well as his interest to carry it to the choice of assignees; first, for the sake of the petitioning creditor himself, and, next, to afford the Court the means of dealing with the commission, as to what took place upon the choice of assignees. We perfectly well know that a petitioning creditor who takes out a fiat pledges himself to prosecute it to the full extent of working it for the benefit of the creditors, and he pledges himself that there shall be assignees chosen under the commission; and if the commission is in such a state that assignees cannot be chosen, the Court would throw upon the petitioner himself the duty and necessity of being assignee for the interest of the creditors. But can a commission be worked out in this way of looking at it, where a meeting has been held for the choice of assignees, and no creditor was present? Can it be worked by making the petitioning creditor assignee?

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Petitioning creditor's duty as to proceeding to the choice of assignees.

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ing creditor
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tion?

Why the petitioning creditor is the last person in the world who ought to be assignee. Somebody must be assignee, who is to check the petitioning creditor in taking the accounts of the dealings with this property. When the Court finds a commission has gone on to the choice of assignees, and no assignee is chosen, and it comes back to the Court, the Court says, the petitioning creditor shall be assignee; the commission shall not fall to the ground where he has taken out a commission. But can I do so in this case? Can the Court say, that this is a commission which shall go on, and that the petitioning creditor shall be assignee of property covering 15,000*l.*, and other property to a large amount? Can it do so? The Court finds the case has gone regularly to the choice of assignees, and there is no person who can be assignee but the petitioning creditor, and he cannot be assignee unless the Court appoints him. Can the Court appoint this petitioning creditor assignee? And if there is no assignee, how can this commission of bankruptcy be worked in the way that a commission of bankruptcy ought to be worked? But an application was made that the petitioning creditor might be at liberty to take security for a certain amount, and prove for the difference. Now, although it has got a little beyond the strict practice, (and the introduction of that practice we all recollect,) (a) I apprehend it never is very properly applied to a petitioning creditor so coming, or indeed any creditor so coming, but particularly a petitioning creditor, unless there is something stated which shows that the property

(a) See *ex parte Nunn*, 1 *Rose*, *parte Greenwood*, *Buck*, 325; *ex parte Martill*, *id.* 325; *parte Hopley*, 1 *J. & W.* 435, *ex parte Smith*, 2 *Rose*, 64; *ex parte Smith*, 2 *J. & W.* 220, 1 *Gl. & J.* 65; *ex parte Smith*, 2 *Gl. & J.* 105; *ex parte Barclay*, 1 *G. & J.* 272.

will suffer, (as for instance, a frost taking place, by which hops or something of that sort would get wasted or destroyed,) and that it is for the benefit of all parties that the course should be adopted which he tenders; namely, to let him take a security for a certain amount, and prove for the difference, and submit to any order of the Court on the matter when the assignees are chosen. Is this a case in which such an order ought to be made? And must this Court lose sight of every thing that has taken place?

I have dealt with it now upon the best test in the world. I have brought it to a state of things in which, in the regular administration of bankruptcy, this bankruptcy cannot be worked; in which the bankrupt is entitled to say, there is no other creditor come in under the bankruptcy at the second meeting. And, having regard to this, if the creditors were in at a point of time at which, with the consent of the creditors, the commission, in ordinary practice, could be superseded, attending to the state of the account between the individuals, are we not brought to this mode of looking at it? first, independent of what has taken place in the suit, attending, *à fortiori*, to what is now depending in the court of equity,—looking at the state of conduct of the party under the commission,—looking at the state in which we find the proceedings, the inference being, that there is no creditor in the world to be benefited by this commission,—that there is no mode of working it out, even for the petitioning creditor himself, or with justice to these parties, except by doing, what I believe has never been done in any case, and which, if this commission is to stand, must be done in this case,—arming the bankrupt himself with the authority of assignee? I shall not be the first to intimate that I think such a practice ought

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(a) See *ex parte Jackson*, Coop. 286.

1838. to be adopted, having no inclination in the world to aid the petitioning creditor in his difficulty. In this case, therefore, it does appear to me that it was a harsh proceeding against this man, to drive him, as they have done, to an act of bankruptcy, and to make that the foundation of a commission of bankruptcy against him. I almost regret, as far as I may regret, to say that I consider it a good commission in point of law; but I have not a moment's hesitation in saying that it is one which this Court is bound, upon the principles of equity to which I have adverted, to supersede.

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Sir John Cross : —

There were two questions in this case. The first was, whether there was a sufficient act of bankruptcy; and the second was, whether, nevertheless, under the circumstances of this case, the fiat must not be superseded. The act of bankruptcy itself, which is set up in this case, is created by the act of parliament recently passed for the abolition of imprisonment for debt; and by the 8th section of that act it is provided, that one or more creditors of a trader may file an affidavit in the Court of Bankruptcy, alleging that *A.* is a trader, and is indebted to *B.* in a sufficient sum of money, and that he verily believes that he is such trader. It therefore appears to me, which, I believe, is not disputed, that that clause requires the affidavit to be made by a creditor. Now this affidavit is not made by a creditor. I am speaking of what appears upon the face of the affidavit. The act of bankruptcy consists of two incidents: the first is the affidavit of debt of the creditors; the next is the subsequent default of the debtor. Now the default is admitted, and therefore the only remaining question is, whether this affidavit, upon the face of it, within the four corners of it, without looking to any extra-

neous circumstances whatever, is sufficient of itself to create an act of bankruptcy, when coupled with the facts.

Various objections have been raised to this affidavit as an act of bankruptcy. One is, that it is not taken before the proper officer; another is, that it is not made by the proper party; and another is, that it is not filed in the proper place. The sufficiency of this affidavit involves some questions of the greatest public importance to the interests of the commercial world; and therefore, although any observation upon them is not very material for the decision of the present case, yet they must not, I conceive, be passed over in silence.

The first objection is to *the person* before whom this affidavit is taken. It is taken before a master extraordinary in chancery; and it is said that a master extraordinary in chancery had no lawful authority to take this affidavit, or to administer an oath. If that be so, then the intention of the legislature in making this new act of bankruptcy is entirely defeated, and becomes a nullity; and not only so, but the whole system of bankruptcy becomes almost altogether useless, for that act of parliament, upon which nineteen out of twenty bankruptcies proceeded, is virtually abolished, because no debtor will have occasion to keep out of the way to avoid arrest, because he cannot be arrested; and therefore, in order to uphold the bankrupt system at all, it seems to me that the legislature provides this peculiar act of bankruptcy, and no other. Now the 8th section does not say before whom the affidavit shall be made, but says only where it shall be filed. That clause appears, upon reference to the 10th section of the general bankruptcy act, 6 Geo. 4. c. 16., to be a literal transcript of that clause. The 10th section is to enable a creditor to make a member of parliament a bankrupt exactly in the same way, by obliging him to file an affidavit; and

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Before whom
the affidavit
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that 10th section, though it states where the affidavit shall be filed, does not state where it shall be sworn. So that the one clause is a literal transcript of the other; and the same difficulty, it will be said, subsists in both.

But has not a master extraordinary in chancery power to administer the oath in question? I should say that, inasmuch as the legislature has not said who shall take the affidavit, and intended that it should be taken by somebody, we must look to what the intention of the legislature was. The intention of the legislature could be nothing but this, that it should be taken in the usual course. What was the usual course? To take all such affidavits before a master extraordinary in chancery. But it does not depend merely upon the usual course, for the 38th section of the act of parliament, which constituted the Court of Bankruptcy, expressly provides, that in all matters within the jurisdiction of the Court of Bankruptcy, affidavits may be sworn before a judge, before a commissioner, before a master ordinary or extraordinary of the Court of Chancery. Then, let us ask, whether this is not a matter within the jurisdiction of the Court of Bankruptcy. It is made for the express purpose of being introduced into this Court as a material ingredient in bankruptcy. I am therefore of opinion, that if there was any doubt upon the usage, the 38th section of 1 & 2 Will. 4. c. 56. (a) expressly authorizes the master extraordinary in chancery to administer the affidavit in question; and it is of great importance, as this is the first case which has occurred before this Court upon the subject, that it should be understood, by the profession and the public, that this Court entertains not the smallest doubt upon that point.

Then the next objection is, that this affidavit is

(a) See this section, post, Appendix.

sworn by an agent, and not by a creditor, as required by the 8th section of the new act of parliament. Now I admit, for the present purpose, that an agent of a banking company, established within the provisions of the 7th Geo. 4., might make this affidavit; but if you look to the affidavit itself it is extremely defective in showing that the party who makes the affidavit is an agent within the meaning of that act of parliament. I should have expected that he would have stated in the terms of the act that he was a public officer of the company, nominated pursuant to the act of the 7th Geo. 4. He does not say so; he says only that he was "duly authorized to sue." In the next place, I should have expected that he would state that the company which he represented was a company carrying on business pursuant to the act; for the act of the 7th Geo. 4. authorizes an agent,—a public officer of any company carrying on business pursuant to the act. The affidavit does not state that the company is carrying on business pursuant to the act, but merely that they are united for the purpose. Now it is difficult to say "being united for the purpose" is a distinct allegation that they are actually carrying it on. These two objections, therefore, have raised in my mind very considerable doubt, whether that affidavit, in substance and matter of fact, is sufficient to authorize an agent to make that affidavit which the act of parliament requires should be made by the principal.

Now, be that as it may, upon that point it is unnecessary to give any opinion, as will appear in the course of what I have further to say upon the subject. But there was a third objection taken, which is also of great public concernment, and to which, therefore, I feel it my duty to advert. It has been suggested that this affidavit has not been *properly filed*; that the act of parliament

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agent under
7 Geo. 4. c. 46.
and 1 & 2 Vict.
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requires it should be filed in the Courts of Bankruptcy, and not in the Court of Bankruptcy, and it has been suggested that the Court has been split into so many different courts and divisions that there is no such thing as the Court of Bankruptcy,—that the Court of Bankruptcy is a non-entity.

The constitution
of the Court
of Bankruptcy
considered.

Now it is necessary that we should come to a clear understanding upon that subject. The act of parliament which constituted this Court constituted a Court of Bankruptcy, which, like the Court of Exchequer, was to be a court both of law and equity, and to be a court of record; and it was to constitute judicial administration and ministerial officers. It provided for the appointment of judges and commissioners to administer the judicial duties, and ministerial officers to practise the ministerial, and registrars. That is the constitution which the legislature has thought fit to give to the Court, and the Court was thereby constituted an integral court, consisting of a variety of branches, but still one integral court of record; so that all the proceedings in every department of the Court were acts of the Court, and done in the Court.

This was the state of things; and according to its constitution the business of the Court is carried on. The commissioners acting for the London district were incorporated expressly by the act of parliament into the Court of Bankruptcy. The board of commissioners acting in the country, though equally under the jurisdiction of this Court, was not expressly incorporated by the act within the Court itself. The business went on perfectly well until it happened that one of the commissioners of the Court of Bankruptcy imposed a fine upon a solicitor for a contumacious letter addressed to him in respect of his conduct in the execution of his office. The commissioner thought it was his duty to impose a

fine upon that solicitor. The solicitor complained to the Court of Exchequer. The Court of Exchequer discharged the fine. They held that the commissioner had no power to impose it; and they disclaimed any such power in themselves as judges when sitting in their chambers at Serjeant's Inn, to impose a fine of that kind; and they held that the only regular course upon the occasion was, that the matter should be referred to the Court precisely as a master in chancery refers similar matters to the Court itself to be disposed of. There the matter was at rest; there the Court of Exchequer distinctly decided that the whole was one entire court, and that the commissioners acting in the discharge of their duty were acting in this Court as masters were in a court of equity; all the judicial duties of which belonged to the Court. That was the case of the *King v. Faulkner* (a), which seemed to settle all doubt upon the subject. Nevertheless, the reporter in a note says, that that case gave rise to a clause (b), which in the course of two or three months afterwards was introduced into the act for the appointment of accountant general in the Court of Bankruptcy, and that clause I believe no judge of this Court ever saw till it was passed into a law, and it certainly was done without any communication to the Court. It contains a clause reciting that great doubts have been entertained respecting the Court of Review, and respecting the commissioners,—doubts which were never entertained,—and then it proceeds to enact, upon the ground on which the fine I have alluded to was imposed, that the commissioner's was a court of record, or he had the power of a court of record, and all courts of record could impose a fine.—The Court of Exchequer thought otherwise, and decided that the commissioner

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(a) 2 Mont. & Agr. 311.

(b) Sec 5 & 6 W. 4. c. 23. s. 25., post, Appendix.

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had not power to impose a fine.—However, this clause was introduced, stating that doubts were said to be entertained upon the subject, and then it enacts that the two subdivision courts shall be courts of record, and that each individual commissioner sitting alone to discharge his duty shall have the power of a court of record. Now there is no power of which I am aware that this act could intend to give, save and except that power which the Court of Exchequer decided did not exist; namely, the power of imposing fines, because that is generally considered as emphatically incidental to a court of record. However, it occurred to some, in the course of the progress of the bill through parliament, that that would be contrary to the decision of the Court of Exchequer. Accordingly an amendment was introduced, that this clause shall not extend to empower the commissioner to impose a fine or imprisonment, and so the proviso completely annulled the clause. And again, in the bill for abolishing imprisonment for debt (a), the same subject was provided for, which would have given the commissioners power of imposing a fine; and a clause was introduced into the bill, that from and after the passing of the act, every commissioner acting in the execution of the duties of the Court of Bankruptcy shall be and constitute a court of record. The other act had given them the power of a court of record; but this constitutes them a court of record, and also gave the commissioners power to make certain rules and orders for regulating the practice in their several courts, which power at present is vested by law in this Court. That clause was struck out; and I only advert to it to show, that these things have introduced a great difference of opinion into the profession respecting the boundaries of

(a) 1 & 2 Vict. c. 110.

the duties of these supposed several courts; and I wish, therefore, to show, that down to the present moment, notwithstanding what has passed, this, the Court of Bankruptcy, is one integral court, and that it sits here for all the judicial duties of that Court under a different name. Perhaps it is to be regretted that the whole Court in all its departments has received from the legislature the denomination of the Court of Bankruptcy; and from the same authority, namely, the authority of the legislature, the judicial branch of the Court of Bankruptcy has also another denomination, namely, the Court of Review.

But with regard to the subdivision courts, they are identically the same as all the local boards of commissioners; they have not one jot more power, authority, or jurisdiction than those several boards have. Nor can I see the slightest reason or utility in constituting subdivision courts, which are merely divisions for convenience, (subdivision courts constituting courts of record), with the exception that they shall not fine, when they have no judicial power to determine between parties litigating, or to record any judgment, or to be of any use whatever but to bear the name of a court of record. Therefore, all the division courts (if I may so call them), all the boards of commissioners throughout the kingdom, whose business it is to execute the fiats, commissioners in London having no power or authority whatever but to execute the fiats which are sent to them, are in all respects the same; and a subdivision court perhaps it should not have been, unless all the other boards were made at the same time courts of record.

I have thought it necessary to advert to these circumstances, in order to account for what appears extraordinary, that the legislature should use the expression "Courts of Bankruptcy," because the very same clause speaks of

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the commissioners of the Court. I therefore wish it to be distinctly understood, that a sub-division court is not a Court of Bankruptcy; that a single commissioner sitting alone in the exercise of his duty, is not a Court of Bankruptcy, but they are both members of this Court, discharging their duties in a court of record—one entire court of record, of which we are all members. So much, then, for that objection with regard to the filing of the affidavit.

Act of bank-
 ruptcy.

But if this is a good affidavit, and made by a sufficient party, I am of opinion that it is a complete act of bankruptcy; and this brings me to the next question, and the most important of all. These other questions to which I have adverted concern the public; the question to which I am about to advert concerns only the parties in the present litigation. Is this a fiat, which, under all the circumstances, we are bound to sustain; even legally bound, looking at all its incidents? In order to come to a conclusion upon that question we must look a good deal in detail to the circumstances; and for the purpose of avoiding that, I rather wished the Court could have come to a conclusion upon the question of law, whether it was a sufficient act of bankruptcy; for if the Court were all agreed that it was not a sufficient act of bankruptcy it would have been unnecessary to consider the general question.

The equitable
 circumstances.

Now, what are the circumstances of this case? Mr. Hall was one of the directors of a banking company. He was no trader, except in that capacity; he was not indebted to any person except on the partnership accounts. Those accounts were disputed between him and his partners. They filed a bill in equity against him, which was the regular mode of proceeding by partners against a partner for an account; and in order to have all these matters settled it prayed an account.

It was therefore a bill in equity by several partners against one praying an account, and praying that certain securities might be rendered available. The company were the plaintiff in the suit, and Mr. *Hall* their partner was the defendant. The suit proceeded to filing the answer, which, from an unfortunate accident of the counsel not having prepared it in the long vacation in due time, was enforced by an attachment. The answer was filed; the matter was ready for hearing. The plaintiffs having got so far, it occurs to them, that they had much better make a bankrupt of this debtor. And this new act having intervened, it occurred to them, that if they could file an affidavit of debt large enough, they might possibly drive Mr. *Hall* to an act of bankruptcy. Accordingly, they made an affidavit of a debt to the amount of 15,000*l.*, giving no credit for the securities; and, swearing to a debt of such an enormous amount, it became impossible that the party should get bail to that amount, far beyond, as it would seem,—any thing that he owed to them on the balance of the account. He was compelled, therefore, by the act and contrivance of his partners, one of whom was a solicitor whom he had dismissed from the office of solicitor to a bankruptcy of which he was himself assignee,—he is driven into the snare and trammels of an act of bankruptcy, out of which he could not escape, because it was impossible to give security against this enormous charge of a legal debt against him. Accordingly he did not find bail. Upon not finding bail in the Court of Bankruptcy, as required, he is made a bankrupt, simply upon the affidavit of one of his partners. They carry down the fiat. The first thing they do when they come to open it, is to apply to the commissioner for a provisional assignment to themselves, the petitioning creditors, a thing contrary to all usage. I have had pretty long experience as a com-

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missioner of bankruptcy, and in my life I never gave a provisional assignment to a petitioning creditor, especially to this enormous amount. I have certainly, for one, always refused to do so. (a) It is a well known rule in the appointment of provisional assignees, that there must be some cause for appointing them; and that cause must, Lord *Eldon* says, be recorded upon the proceedings of the commissioner. No cause is shown whatever for executing this provisional assignment; no necessity whatever appears for it. But see what is the effect of it. It gave the petitioners a power to seize instanter, and made them, in fact, the owners of all the estate, real and personal, of the bankrupt, and gave them the power to turn him and his family naked out of house, without a particle of property; all being done by the force of law, and the strong hand which has been laid upon it entirely at the disposal of his adversary in the suit in equity.

Well then, the next thing was, after the creditor had thus got all the estate and effects into his own hands, the debtor says, "This is my only debt, and that debt is *sub judice*, and I have no other debt." The Court thought this was very surprising, and the Court paused until the appointed meeting of creditors had passed away, where creditors were called upon to prove their debts, and assignees were to be chosen. The commissioners met; they could not stir a step in the execution of this fiat; they sat their hour away; received their fees out of the estate of this unfortunate bankrupt; they had nothing to do; no creditor appeared to prove a debt;—no, not even the petitioning creditor himself;—and no assignees were chosen, and the prosecution of the fiat broke down altogether.

In this state of things, it appears to me that this

(a) See 1 *Mont. & Agr. B. L.* 113.

is not a case to which the legislature intended that the bankrupt law should be applied. We all know that the general principle of the bankrupt law is, to obtain an equal distribution of the effects of the insolvent debtor among all his creditors. Now it is not pretended that there is any equal distribution to be made among the creditors. There is no creditor but one; the plaintiffs in the bill in equity, and the partners of the bankrupt. So that, without going any further, it seems to me to be quite monstrous to say, that it should be endured that all this gentleman's property shall be continued as the legal property of his adversary in the suit in equity, and that he has no power in the prosecution of that to obtain his rights.

Some doubt at first occurred upon this part of the case, as to whether there was any precedent which would show the Court ever went the length of disturbing a fiat which had been established in all its legal incidents under circumstances similar to the present. Now there is a case I find in 4th *Vesey*, remarkably similar to the present in many of its circumstances; but when cases depend upon their circumstances, of course you do not find them altogether the same. But in the case of *ex parte Bowes* (a) there was a suit in equity between the parties, although it was not the plaintiff in equity, but the defendant, who became the petitioning creditor. He was not satisfied with the progress which the suit in equity was making, and he thought it would be a better thing to make his adversary a bankrupt, and accordingly he did. Now, without detaining the Court by going through all the circumstances of the case, though there were many other creditors, the Lord Chancellor held, that as the commission was founded upon the debt

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(a) 4 *Ves.* p. 168.

1838. of a creditor who must of necessity gain the whole direction and dominion over his adversary's property, it should not be allowed; and accordingly Lord *Loughborough* in that case superseded the commission, with costs, to be paid by the petitioning creditor. What shall be the result of this case I do not take upon myself to say, with regard to costs. I only say, I am decidedly of opinion, that, upon the merits, this fiat ought to be superseded.

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The CHIEF JUDGE:—

In this case the petitioner seeks to annul the fiat under which he has been adjudged a bankrupt, on two grounds; first, that the requisites necessary to support the fiat in law have not been proved; and, secondly, that the fiat has been issued from motives and under circumstances which call for the equitable interference of this Court to prevent the abuse of the process of bankruptcy. With regard to the legal sufficiency of the fiat, it has been impugned upon three grounds:—first, that there was no trading; secondly, that there was no petitioning creditor's debt; and, thirdly, that there was no act of bankruptcy.

Trading.

The objection upon the ground of trading seems to have proceeded upon a misconception of some expression which fell from the judges of the Court upon a former petition to supersede. (a) In that case it appeared to the Court that the party who was seeking to supersede his own fiat had purchased shares in a banking company, not for the *bona fide* purpose of joining in the trade, and becoming a banker, but simply for the purpose of making a ground to sue out a commission of bankruptcy under which his affairs might be settled;

(a) *Ex parte Brundrett*, 3 Mont. & Ayr. 50.

and the Court upon that occasion said, that in that case they could not consider that the mere fact of purchasing the shares, where they could see that the object was, not to become a trader, but merely to become a bankrupt, would support a commission thus issued out for the bankrupt's own purposes. But it never intended to say that a shareholder in a company of this sort did not thereby make himself a bankrupt; that he did not thereby make himself a trader; or that it would be competent for him, in any action against him, to set up that he had not thereby made himself a trader; because the very fact of signing the deed of copartnership for carrying on the business which the acts of parliament had declared to be a trading within the bankruptcy laws, had, as against himself at least, afforded conclusive evidence that he had become a trader; but in this case, where he was not only a shareholder, but the trading of such a bankrupt was a trading within the act by being manager of the business, it never could be doubted for a moment that it was a good trading.

The next objection is to the petitioning creditor's debt; and this objection is founded on the fact, that the fiat has been issued out by a company of which the bankrupt is a member, in respect of a debt due from him to the firm. In ordinary cases this would be a fatal objection; but the petitioning creditor in this case relies upon the provisions of certain acts of parliament, by which individuals carrying on business in copartnership as bankers may authorize certain officers, to be named by them, to sue for them, and, among other provisions, to sue the members of their own firm.

Now, the objection to a partnership suing out a commission against a member of their own firm arises from the nature of the debt, which was due from the one to the whole body. No action at law could ever have

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been maintained, either by the firm or by any portion of the firm, against a member of that firm, for any debt due by that member to the whole firm. No action could be prosecuted by the whole firm; because then the debtor would be both plaintiff and defendant, a thing that is never allowed in an action at law. He, as a member of the firm, if the action was brought by the whole firm, must have been one of the plaintiffs, and as being debtor, he would have been one of the defendants. Neither could it have been brought by any of the members of the firm, in respect of their portions of the debt due from the one to the other, because that portion, or the portion due to each, must depend upon taking the whole partnership accounts, which courts of law never will do, however easily they may be ascertained; and, although it may appear on the face of one or two documents what the precise proportion of each will be, that task they leave to a court of equity. Inasmuch, therefore, as this would have been an equitable debt only, due from the bankrupt to the firm of which he was a member, there could be no action brought, and, consequently, there could be no fiat issued out, because the petitioning creditor's debt must be a debt recoverable at law. But by the statute 1 & 2 Vict. c. 96., amending the former act of 7 Geo. 4. c. 46., the legislature has thought it right to enact, "that any person, now being or having been, or who may hereafter be or have been, a member of any copartnership now carrying on, or which may hereafter carry on, the business of banking, under the provisions of the said recited act, may, at any time during the continuance of the same, in respect of any demand which such person may have, either solely, or jointly with any other person, against the copartnership, or the funds or property thereof," sue, and be sued by, the public officer ap-

pointed under the recited acts. And it goes on to state, "That the person, having been and being a member, shall be capable of proceeding against the copartnership by the public officer, and be liable to be proceeded, against, by or for the benefit of the copartnership, by such public officer as aforesaid, by such proceedings, and with the same legal consequences, as if such person had not been a member of the said copartnership." Without referring then to the language of the 7 Geo. 4., by the force of this statute (1 & 2 Vict. c. 96.), coupled with the 4th section, which takes away any right of set off which such member might have in respect of dividends of shares or profits of the concern, the public officer would have a right to bring an action; and it would necessarily follow, as it appears to me, he might also petition for a fiat in bankruptcy; for though it has been objected that it has been decided in the case of *Guthrie v. Fisk* (a) that an act of parliament authorizing a company to sue and be sued by their secretary did not authorize that secretary to sue out a fiat in bankruptcy, yet that decision proceeded upon the language of that particular act of parliament, which expressly confined it to suing and being sued; and being a private act of parliament, the court thought they were bound to construe it strictly, and thought that, under the provisions of that statute, it was obvious the legislature had not intended to extend the power of the secretary to take proceedings in bankruptcy. But here the language is much more extensive. The language refers, not only to all proceedings in law or equity, but "by such proceedings, and with the same legal consequences, as if such person had not been a member of the said copartnership." It appears to me, therefore, that that would have removed the objection to the pro-

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(a) 3 B. & C. 178; 5 D. & R. 24; 3 Stark. 155.

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cess in bankruptcy being taken out for the purpose of recovering a debt due to the firm. And then, looking back at the 7 Geo. 4. c. 46. s. 9., it is clear that the legislature intended, that in all those cases where a partnership might sue, or might take out a commission of bankruptcy, that the secretary or the registered officer was the proper person to institute these proceedings; for the 9th clause says, "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted, and may be prosecuted, in the name of the registered public officer." Therefore, whatever might have been the effect of this clause, taken by itself, before the passing of the recent statute of 1 & 2 Vict., it appears to me that, taking the two acts of parliament together, the fiat was well sued out by the registered officer of the company against the bankrupt, for a debt due from him to that firm.

Act of bank-
ruptcy.

The next objection is, that there has been no act of bankruptcy. Now the act of bankruptcy relied on is that created for the first time by the statute which has been alluded to, of the first and second of her present Majesty, c. 110. sec. 8., which enacts, that it is lawful

for the creditor to "file an affidavit in her Majesty's Court of Bankruptcy, that such debt or debts are justly due to them," and so on; and that if the debtor does not, within the twenty-one days, give security to the satisfaction of the commissioners, that it shall be an act of bankruptcy. There is no dispute that the affidavit made by Mr. Stubbs, the registered officer of this company, swearing to a debt due to the company from the bankrupt, was filed by the company in the Court of Bankruptcy; nor is there any dispute that a copy was duly served on the bankrupt, who admitted he did not pay or secure the debt as required by the statute. But the objections raised are, first, that the affidavit was not sworn before any person authorized to take it; secondly, that it does not appear, on the face of the affidavit, to have been taken by any person so authorized; and, thirdly, that it does not appear on the affidavit that the deponent is a person authorized to make such an affidavit. The affidavit in question is sworn before a master extraordinary in chancery. Now, as has already been observed, the statute is altogether silent as to the person before whom the affidavit is to be sworn. So it was in the case to which my learned colleague has alluded, the 6 Geo 4. c. 10. s. 10. with reference to the member of parliament; but under that statute it was always considered, that inasmuch as the clause directs the affidavit to be filed in some court of record in Westminster, and thereupon to sue out process out of that court in which that affidavit was made, it necessarily follows that the affidavit was to be sworn before that court, or by some person authorized by the court to take affidavits. It seems to me that the same inference is fairly to be drawn from the language used in this statute. The legislature, in saying nothing as to the person before whom the affidavit was to be sworn, and directing

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merely that it shall be filed in the Court of Bankruptcy, appears to me necessarily to lead to the conclusion that it should be sworn before such person or persons as were authorized by the constitution of the court to take affidavits in matters coming before the court, or in matters where affidavits were to be filed in that court; and then, inasmuch as by the act of parliament under which this Court of Bankruptcy was constituted it is directed that affidavits in matters within the jurisdiction of the court should be sworn before, among others, masters extraordinary in chancery, it seems to me that this affidavit was well sworn before the person who signed the jurat. At one time it struck me there might be an objection, inasmuch as it did not appear for what purpose this affidavit was sworn before the master extraordinary in chancery. If the master extraordinary in chancery had been a mere officer of this Court to take affidavits, or if the affidavits had been taken before the commissioner or judge of this Court, then it would have been obvious it could have been sworn for no other purpose than that of being used in the Court of Bankruptcy; but inasmuch as the master extraordinary is authorized to take affidavits in chancery upon matters before the Lord Chancellor, it struck me that it did not appear on the face of the affidavit what was the purpose for which this affidavit was sworn; and that it might have been difficult to prosecute the person for perjury, inasmuch as an affidavit sworn for one purpose, and used for another, is not the subject of indictment for perjury; and a person is only guilty of perjury in the case where it is used, and not in the case for which it was sworn. But, on looking through the cases, it appears to me that the difficulty has always arisen, not to ascertain the purpose for which it was sworn, but to

ascertain whether the person taking the affidavit was authorized to take the affidavit in the court in which it was filed. It has been decided in many cases (a), that if the jurat showed the affidavit had been taken before a commissioner, not stating of what court he was a commissioner, the court in which it was filed would not consider that affidavit as taken in their court, because there was nothing to show that it was taken before a commissioner of the court. If it appears it was taken before a commissioner of that court, or any judge of that court, it would be considered as properly taken.

Now, looking through the cases, the difficulty is removed from my mind, and I think therefore there is no objection to the sufficiency of this affidavit.

But the third objection commented upon was, that it does not appear upon the affidavit that the deponent is a person authorized to make such an affidavit. The act of parliament enacts, "it should be made by a creditor or creditors;" and it is said it nowhere appears in this affidavit that Mr. *Stubbs* was a creditor. He certainly does not state he was one of the body in respect of which he institutes this proceeding. If he had been a partner of the firm, of course the usual affidavit made by a partner might have been made, and that would have put an end to the objection; but inasmuch as he does not state himself to be a member of the firm, it could only be as by a registered officer authorized by the act to sue in the name of the company, that he could call himself a creditor. And it is said it does not sufficiently appear on the face of this affidavit that he is a registered officer within the terms of that act of parliament. If this had been a question of pleading, I should have been of

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By whom affidavit made.

(a) See *Chit. Burn's J.* vol. 5. tit. Perjury, s. 1.

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the same opinion, that it does not appear with sufficient certainty to uphold a plea under a demurrer that he was the registered officer within the meaning of this act of parliament.

But, though the affidavit is not sworn with all the characteristics of a special plea, it is enough if it appears upon the face of it generally that he claims to be a creditor upon the ground of his being the registered officer of the company carrying on business under this act of parliament. He states positively that he is the registered officer of this company. He states positively that this company was united for the purpose of carrying on business; but it is supposed, because it does not say *carrying* on business, but only united for the purpose of carrying on business, it is not sufficient. It appears to me it is quite sufficient to support the affidavit that he institutes this proceeding as the registered officer of the company under this statute, which statute, with reference to it, authorizes the registered officer to sue on behalf of the company.

I am therefore of opinion that upon none of the grounds has the invalidity of this fiat been established.

Then it has been suggested during the argument,—suggested from the bench, and was urged from the bar in consequence of that suggestion,—that this fiat could not be supported; that the circumstances of this case are such as to induce the court in equity to supersede the fiat, whatever may be its legal validity.

Now I have the misfortune not to see the case in so strong a light as that in which it has been viewed by my learned colleagues; and if the case were left to my sole decision I should not have pronounced for this supersedeas on the present occasion. At the same time there is a great deal in what has been stated in the judgment by the Court which induces me to think that, probably,

Equitable
supersedes.

the most equitable course has been arrived at, in getting rid of this fiat; because it does appear to me to have been a harsh proceeding, and that the party has no right to complain of this fiat having been taken from him; and there might have arisen circumstances under which I should have thought it ought to have been superseded. But it does appear to me that it is rather premature to supersede this fiat upon the ground of there being no other creditor, and there being no choice of assignees; and I should rather have waited to have seen that the conduct of the fiat was so embarrassed by the circumstances of there being no choice of assignees that it could not be properly prosecuted.

With respect to the other ground, namely, that the party swears himself to be solvent, and that this fiat has been taken out, not for the *bond fide* purpose of recovering this debt, but for the purpose of removing him from the situation of trustee, and as assignee under another commission, it does not appear to me that those circumstances have been made out in evidence. It does not strike me, that, taking all the affidavits together, I could rely on the bankrupt's assertion that he was solvent; because if he were in solvent circumstances the provision made by the statute might have been easily complied with. He was not called upon to pay this debt; he was not called upon to give security for its immediate payment, nor indeed for its payment at all; but all that he was to give security for was, that he should pay such debt as should be recovered in an action or actions at law; or that he should render himself.

Now if the person had been in solvent circumstances, it strikes me he would have found no difficulty in getting security to that extent, if, as is stated, the debt due to the petitioner had been covered by ample security; but that, as I collect the facts from the affidavits,

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1838. is denied by the company: they deny that the security given is sufficient to cover the debt; and therefore it does not appear to me that upon the ground of solvency, or of the other circumstances, there is enough to supersede the fiat. It is certainly a strong circumstance that no other creditor has come in, and it might give rise to difficulty and embarrassment in the working of this fiat, which might have induced me to supersede on that ground; but it strikes me that it would have been better to have paused, and to have seen whether eventually such might have remained the condition of the fiat; because other creditors, when they found it was to be carried on, might have come in.

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I should have waited until the adjourned meeting for the choice of assignees,—until circumstances had shown the fiat could not be prosecuted; but as my colleagues think the other circumstances of the case call upon them to pronounce an order for a supersedeas of this fiat, of course the order must be, that this fiat should be superseded.

Fiat superseded, with costs. (a)

(a) As soon as his Honour the Chief Judge had delivered his judgment, the respondent's counsel submitted, that, at the suggestion of the Court that it was unnecessary they should argue some of the points, Mr. Wightman and Mr. Bacon had not been fully heard. The Court thereupon allowed them to re-argue the case to a considerable extent; but there being no novelty in substance in the arguments, they are not here added.

This Case was carried by appeal to the Lord Chancellor, and will be completed in the next Number.

CASES

IN

BANKRUPTCY.

In the matter of GEORGE HALL.

L. C.
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THE fiat in this case having been superseded by the order of the Court of Review, confirmed by the Lord Chancellor, application was made to the Lord Chancellor, by motion, on behalf of the petitioning creditor, for leave to present a petition to his Lordship, in order that, in that form, the question of the validity of the fiat might come before his Lordship.

Quære, Whether the Court of Review having superseded a fiat, and the petitioning creditor having been offered a special case, alleged by him to be erroneous in omitting material facts and in inserting as findings of the Court matters which were not found, and the petitioning creditor rejecting the special case, the Lord Chancellor has any

Mr. *Swanston* and Mr. *Bacon* :—Upon the hearing of the original petition the judges of the Court of Review differed in opinion. We applied for a special case, and we laid before their Honours a statement of what we conceived to be the facts of the case. That was thrown aside, and a very summary paper offered to us as the only special case which we might take. This omitted

original jurisdiction to try the validity of the fiat? Leave given to discuss the point before the Lord Chancellor on motion or petition, without prejudice to question, whether at all events a petition is not necessary.

Quære, Whether there is any mode of appealing from the shape in which a special case is settled by the Court of Review?

The 1 & 2 W. 4. c. 56. s. 19. was not intended to revest in the Lord Chancellor the duty of trying questions of supersedeas on his original jurisdiction; but to protect the Great Seal from being called upon to obey the order of another court.

Where the Court of Review supersedes a fiat, the Lord Chancellor cannot order a *procedendo* without examining merits of order of the Court of Review,—*ergo*, without an appeal.

Ex parte Keys, 3 Dea. & Ch. 263, 1 Mont. & Ayr. 226, commented upon.

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altogether to state the execution of the deed by Mr. *Hall*, which is the very basis of our right,—without which we have no pretence either for an action at law or a fiat in bankruptcy; and upon an application for that purpose, we were told that it could not be introduced. Then the suit in equity is unfortunately not so stated as to bring before your Lordship, upon the special case, any thing like a clear statement of what it is. It is represented as a suit for an account, as if it were a suit for a general account between the bank and their debtor partner; the fact being that it was limited merely to making available the securities, and the account was asked only as an incident thereto, and in the usual alternative, that the party might either pay the balance when ascertained, or that he might be foreclosed. Again, a finding was introduced into it, that the fiat was sued out, not for the purposes of bankruptcy, but to remove the petitioner from the office of assignee in certain other bankruptcies in which they were jointly interested, to place all the property of the petitioner, real and personal, at the disposal of the creditor, and to compel him by an *ex parte* proceeding to submit to the full demand sought to be recovered against him, without any judgment or decree in the action at law or the suit in equity then depending between them. In that state of circumstances the essentials of the case are not before you; and here is a finding which we say was not made by that court, which excludes us from any possibility of an appeal. This is therefore a case in which we should be at liberty to proceed, either under the appellate jurisdiction by petition, or under that original jurisdiction, which exists in your Lordship, upon the point whether the fiat should be superseded. [The LORD CHANCELLOR.—If the parties not being satisfied with the special case as settled is a reason for coming here, then

every case must come; for it cannot be supposed that a special case can be settled quite to the satisfaction of each of the litigant parties.]—It is not exactly so. We do not say we are merely dissatisfied with the case, but that a finding was introduced which did not take place in that court. No two of the judges made any such finding. We do not meet with it in the order; nor is there any record of it: there was, in fact, no such finding; nor could there have been, because in the petition there was not the allegation that this fiat was not issued for the legitimate purposes of bankruptcy. It is true the petition did allege that it was issued vindictively, and so on; but supposing there had been those purposes co-existing with the legitimate purpose of procuring payment of the debt, no objection could have been taken: so that we come here, not merely on the ground of dissatisfaction, but because the essential facts are omitted; our deed is not stated; the equity suit is mis-stated, and the finding is not warranted by the record, and in fact did not take place. [The LORD CHANCELLOR:—Your present application is merely for liberty to apply.]—The order has been drawn up, in which there is only the usual recital, that counsel were heard, that affidavits were read, and thereupon the court orders the supersedeas. Upon the order, as drawn up and passed, there is no statement of what is now introduced into the case as special findings; and although permitting parties to come here in every case in which they were dissatisfied would bring appeals which it was not the intention of the legislature to bring into this Court, on the other hand as great an evil might be induced if there was no opportunity of applying to your Lordship in a case like this, and appealing from the manner in which the special case is proffered to us. [The LORD CHANCELLOR:—Is

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Quære, If there
is any mode of
appealing
against the
shape in which
a special case is
settled by the
Court of Re-
view?

not the statute against you there (a); because if I recollect the terms of it, it is only on a special case, unless the Court thinks liberty should be given? If it was intended that there should be an appeal from the mode in which a special case is settled, it lets in every case. If it is owing to the particular subject matter that you require the interposition of the Court in some other mode, it is a case within the statute; but I cannot think the statute ever meant there should be an appeal against the mode in which the Court settled a case. (b)] —We do not put it in that way. The statute makes the settlement of the special case final, no doubt. These are the words of the act (c): “That all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as herein-after provided, subject to an appeal to the Lord Chancellor by virtue of this act,” “such appeal to be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct; which special case shall be approved and certified by one of the judges of the said Court of Review in matters arising in the said court, and by the judge trying the issue in matters arising out of the trial of issues; and the determination of such judge on the settlement of such case shall be final and conclusive.” [The LORD CHANCELLOR:—It excludes this Court from jurisdiction upon matters of fact.]—On the appellate jurisdiction it does. [The LORD CHANCELLOR:—I must consider this as an appeal, because you have been to the Court of Review. You may say it is a matter upon which this Court had original juris-

(a) See 1 & 2 W. 4. c. 56. s. 3. post, 504.

(b) See *ex parte Low re Hobson*, 1 Mont. & Ayr. 189.

(c) 1 & 2 W. 4. c. 56. s. 3. See Appendix, post, p. 504.

diction; but you have been to the Court of Review. 1838.
 You have attempted to get a special case settled; you
 are dissatisfied with the mode in which it is proposed In the matter
 to settle it; then the question is, whether the act does of
 not exclude the jurisdiction of this Court, because if I Hall.
 do what you ask me to do I shall permit an appeal on
 a matter of fact.]—But your Lordship's original juris-
 diction is not touched by this section. [The LORD
 CHANCELLOR:—You have excluded that by the course
 you have followed. You have been to the Court of
 Review first, and now you come here.]—That has hap-
 pened in a case before Lord *Brougham*. There was an
 appeal from the Court of Review, and his Lordship
 entertained jurisdiction upon the question of fact, which
 he could not have done by the appellate jurisdiction,
 and he referred it entirely to the original jurisdiction.
Ex parte Keys. (a) We apprehend your Lordship's
 original jurisdiction is not touched by this section, which
 refers only to the appellate jurisdiction. How we are to
 argue the case without the deed, and why that deed is
 omitted, we cannot understand. And then a finding is
 introduced, the only effect of which is, to preclude us
 utterly from appeal. So that, whether it is right or
 wrong, we are, by the omission of that which is the
 strength of our case, and the insertion of this, which
 we say is no finding, prevented from appealing. [The
 LORD CHANCELLOR:—That is pure matter of fact.]
 —Yes, but the alleged finding is fatal to us. We say we
 should be entitled to be heard, not only upon questions
 of fact but of law. One of the learned judges, who
 takes this view of the case, has received the impression
 that such was the view taken by the Court, and that
 there was a finding. If your Lordship should not in-

(a) 3 *Dea. & Ch.* 263. 1 *Mont. & Agr.* 226.

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terpose in this case, there is an utter failure of justice, and we have nothing to do but to submit to the order, however wrong it may be. The finding in the special case is thus:—"The matters of the said petition, together with the answer and objections thereto on the part of the company, as well as the arguments of counsel on both sides, having been fully heard, the Court doth find, that in fact the petitioner was no otherwise a trader than as a partner in the banking company; that he owes no debt but the disputed and unsettled balance of his partnership account, which amounts to at least 200*l*." [we cannot conceive how that sum was arrived at]; "and that he has committed no act of bankruptcy, but the omission to enter into the bond with sureties, as required by the statute, into which act of bankruptcy he was purposely driven by his partners claiming an exorbitant debt, requiring excessive bail beyond what he was able to procure; that he owes no other debt, except to his solicitors, and a few small sums not exceeding 5*l*.; and the Court doth further find, that in fact the fiat was sued out, not for the purposes of bankruptcy, but for the purpose to which only it has been made available; viz. to remove the petitioner from the office of assignee in certain other bankruptcies in which they were jointly interested, to place all the property of the petitioner, real and personal, at the disposal of the company, and to compel him, by an *ex parte* proceeding, to submit to the full demand sought to be recovered against him." The omission is the statement of the deed of January 1837, which contains the admission of the debt, and gives us a legal right. And then there is a mistake with respect to the statement of the proceedings in the Court of Exchequer. Instead of stating the prayer of the bill, a representation is made that it is a prayer for a general account, completely misunder-

standing the nature of the proceedings, which is merely to make available an equitable mortgage which did not comprise the greater part of the securities.

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The LORD CHANCELLOR:—I will let you know on Thursday what I will do with it.

The case stood over.

The LORD CHANCELLOR:—As I understand your application the other day, Mr. *Swanston*, the Court of Review have issued an order to supersede the commission. That is to say, you are applying to discharge the order of the Court of Review. How can you assimilate that to an original application? From the nature of what has taken place, supposing I considered that this Court had original jurisdiction in matters of that sort, how can you assimilate this to a case of original jurisdiction? What you want is, that I should undo what the Court of Review has done.

Dec. 14.

Mr. *Swanston*:—In the case before Lord *Brougham*, *ex parte Keys* (a), the Court of Review had done exactly what they have done here,—made an order superseding the fiat. That was heard upon petition before his Lordship, and the question then appeared to be a question of fact; and of course Lord *Brougham* could not entertain the appellate jurisdiction; but by virtue of the original jurisdiction, which his Lordship said could not be interfered with by the order of the Court of Review, or any thing else, his Lordship administered what he considered to be the justice of the case.

The LORD CHANCELLOR:—You must show me that what you are asking me to do could have been done

(a) 3 *Dea. & Ch.* 263. 1 *Mont. & Ayr.* 226.

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by virtue of the original jurisdiction. That leaves another question behind which it may not be necessary to consider.

Mr. *Swanston* :—Your Lordship observes, we are the petitioning creditors upon a fiat, upon the validity of which we insist. The Court of Review has made an order to supersede that fiat. While that order remains in force, and while there is no order of more prevalent efficacy, undoubtedly we cannot proceed with that fiat. We would ask of your Lordship, therefore, either liberty to argue the validity of the fiat before you, when an order might be made, as I humbly apprehend, to discharge that order, or it would be competent to your Lordship to order a *procedendo* to issue.

Where the Court of Review makes an order to supersede, the Lord Chancellor cannot order a *procedendo* without examining merits of order of Court of Review.—*Ergo*, without an appeal.

Ex parte Keys, 3 Dea. & Ch. 263; 1 Mont. & Ayr. 226; commented on.

The LORD CHANCELLOR :—Not without examining into the merits of that order. How can I examine the merits of that order without an appeal? You cannot ask me entirely to disregard what has been done by the Court of Review.

Mr. *Swanston* :—That was done by your Lordship's predecessor.

The LORD CHANCELLOR :—I have looked at that case of *ex parte Keys* particularly. It is quite clear that Lord *Brougham* considered that he had put the matter in a course which it was not very easy to get out of. He had, upon an *ex parte* application, said that he would hear it upon petition; and the question was, whether that could be raised again without an application to discharge the order; and, finding himself in that situation, he heard it. It is quite clear that Lord *Brougham* considered that question ought to have been in some way or other brought before the Court, and he prescribed the course to be adopted in future. I do not apprehend that Lord *Brougham* meant to lay down any general

rule. In fact, if the rule were taken to be as you consider it, it would bring into this Court every question of supersedeas.

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Mr. *Swanston* :—Upon the hearing before Lord *Brougham* it not only appeared as your Lordship has stated, but it also appeared that the question was one entire question of fact, and upon which the appellate jurisdiction of course was excluded, notwithstanding that Lord *Brougham* said that he should exercise the original jurisdiction.

The LORD CHANCELLOR :—I should like very much to hear any observations you have to make upon this act,—how this Court has original jurisdiction; because that 19th section (a) never was intended to undo all that had been previously done, but it was introduced obviously for the purpose of protecting the great seal from being put in the situation of being called upon to obey the order of another court, which applies to a variety of proceedings in the court. Suppose an order is made at the Rolls, or by the Vice Chancellor, which requires the act of the great seal; it comes to the Chancellor to affix the great seal; the Lord Chancellor gives credit to the decision below; and if that is to be questioned it must be questioned in the regular way, by appeal; but, generally speaking, the merits of the case are not investigated, the decision of the court below is considered sufficient authority for the great seal to act upon; it is the act of the great seal. The jurisdiction of the Rolls, although distinct from the jurisdiction of this Court, if the order requires the interposition of the great seal, can only act by means of the Lord Chancellor; the Lord Chancellor gives the great seal on the authority of the order made

The 1 & 2 W. 4.
c. 56. s. 19. was
not intended to
revert in the
Lord Chan-
cellor the duty
of trying ques-
tions of super-
seas on his
original juris-
diction; but to
protect the
Great Seal from
being called
upon to obey
the order of
another court.

(a) See the section, *post*, Appendix, p. 505.

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at the Rolls. The 19th section (a) is precisely in order to protect the great seal from being put in the situation of being called upon to obey the order of another court. "That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas." The jurisdiction of trying the question whether there shall be a reversal of the adjudication or not is expressly given to the Court of Review; but then that cannot operate till the great seal, under the 19th section, has acted; then it takes the adjudication as conclusive. Now the 17th section (a) seems to me conclusive of what the act meant, because it provides that very thing. An application is made to dispute the adjudication, on which of course the validity of the fiat or commission would depend, "that if any trader adjudged bankrupt shall be minded to dispute such adjudication" then he shall apply to the Court of Review, and then, on the Court of Review making the order, an appeal shall be to the Lord Chancellor from the decision of the Court of Review on matter of law and equity, or on the refusal or admission of evidence only, as provided for in the prior section. It is impossible to distinguish between the question whether the validity of the commission is brought into issue upon some supposed error in the adjudication, or any other ground.

Mr. Swanston: — Your Lordship observes the petitioning question is not under the 17th section.

The LORD CHANCELLOR: — It is the same thing in substance. You are asking, for certain reasons, to sup-

(a) See the section, *post*, Appendix, p. 505.

port the fiat. The application to the Court of Review was to get rid of it. On a question of disputing the adjudication, the Court of Review is to be applied to first, the object in both cases being to get rid of the fiat. What possible distinction can there be on the question of jurisdiction?

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Mr. *Swanston* :—Your Lordship is aware that there are contrary decisions in this Court (a); but the ground, shortly, on which we rest, is this, that the issuing of the fiat is the act of the Lord Chancellor, and that there is nothing in the statute depriving the Lord Chancellor of his original jurisdiction over the fiat.

The LORD CHANCELLOR :—I should like to hear you upon that, if it is necessary. It having in terms taken away all matters which the Lord Chancellor may have heard, they are taken to the Court of Review, except as after excepted. You have to make out that this is a matter afterwards excepted. You see how important it is, because if your construction of the act is right every question in which the validity of the commission is brought in issue may come in the first instance to the Lord Chancellor.

Mr. *Swanston* :—I mean to argue to that extent. Perhaps it would not be asking too much if I asked your Lordship to allow it to be mentioned to-morrow.

The LORD CHANCELLOR :—If you think it expedient to pursue it, you must bring the other party here, that it may be argued on both sides. I do not think the course of giving an order *ex parte*, as a matter of course, merely for the purpose of bringing the other

(a) *Ex parte Keys*, *supra*; *ex parte Butterworth*, id. 688; *re Ma-*
parte Nokes, 1 M. & A. 467; *re berly*, id. 686, S. C. 1 Dea. 75;
Chamber, 4 Dea. & Ch. 578; *ex parte Low*, 1 M. & A. 189; *ex*
parte Britten, 2 M. & A. 687; *re parte Cunningham*, M. & B. 285.

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party afterwards, is an expedient course, unless the Court is disposed to favour the application. I do not feel myself in that situation. Therefore, if you think it worth while to bring the other party here to discuss it in the first instance, you are at liberty to do so.

Mr. *Swanston* :—Your Lordship permits us to give notice of that purpose, if we think it necessary?

The LORD CHANCELLOR :—Yes, I will give you that leave.

Mr. *Bacon* with Mr. *Swanston* :—Your Lordship said that a notice of motion might be given. It will be necessary for your Lordship to give us leave for a particular day, that we may insert that in the notice of motion.

The LORD CHANCELLOR :—It would be a petition, I apprehend. If this be part of the original jurisdiction in bankruptcy, and not taken away by the act, it is on petition, and not on motion.

Mr. *Bacon* :—There are many instances in which applications have been made by motion, similar to this. In those instances, it is true, those motions were refused; but there are in the reports several instances of applications like this. (a)

The LORD CHANCELLOR :—If you like to proceed by motion you are open to the objection that it should be by petition. I do not sanction the motion. You must take your own course. I only say, by giving you leave to give a notice of motion I do not decide that a motion is the right course.

(a) See note (a) *ante*, 499.

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The following sections being referred to in the argument of this case, they are here annexed for the convenience of the profession.

“ And be it enacted, That if any creditor or creditors of any such trader having privilege of parliament, to such amount as is herein-after declared requisite to support a commission, shall file an affidavit or affidavits in any Court of Record at Westminster, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same Court a summons, or an original bill and summons, against such trader, and serve him with a copy of such summons, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the Court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month next after personal service of such summons cause an appearance or appearances to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts.”—6 Geo. 4. c. 16. s. 10.

“ That from and after the passing of this act it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of

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sixty-five miles from London, payable on demand, or otherwise at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid: Provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding." 7 Geo. 4. c. 46. s. 1.

"And be it further enacted, That before any such corporation, or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A.) to this act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as herein-after provided, and also

the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents; and every such amount or return shall be delivered to the commissioners of stamps, at the stamp office in London, who shall cause the same to be filed and kept in the said stamp office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search."—7 Geo. 4. c. 46. s. 4.

" Provided also, and be it further enacted, That the secretary or other officer of every such corporation or copartnership shall and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in manner herein-before directed, and cause to be delivered to the commissioners of stamps as aforesaid, a further account or return, according to the form contained in the schedule marked (B.) to this act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be made payable; and such further accounts or returns shall from time to time be filed and kept and entered and registered at the stamp office in London, in like manner as is herein-before required with respect to the original or annual account or return herein-before directed to be made."—7 Geo. 4. c. 46. s. 8.

" And be it further enacted, That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others,

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whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership."—7 G. 4. c. 46. s. 9.

"And be it enacted, That all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as herein-after provided, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this act such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct; which special case shall be approved and certified by one of the judges of the said Court of Review in matters arising in the said Court, and by the judge trying the issue in matters arising out of the trial of issues; and the determination of such judge on the settlement of such case shall be final and conclusive: Provided always, that all appeals to the Lord Chancellor by virtue of this act shall be heard by the Lord Chancellor only, and not by any other judge of the High Court of Chancery."—1 & 2 W. 4. c. 56. s. 3.

"And be it enacted, That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication if such trader shall be then residing within the united kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the said Court shall allow, (not exceeding

one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impanelled and sworn for that purpose, before the chief judge or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: Provided always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."—1 & 2 W. 4. c. 56. s. 17.

"And be it enacted, That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the existing laws and practice in bankruptcy."—1 & 2 W. 4. c. 56. s. 19.

"And be it enacted, That the said judges and commissioners of the said Court of Bankruptcy shall in all matters within their respective jurisdictions have power to take the whole or any part of the evidence either *videlicet* on oath, or upon affidavits to be sworn before one of the said judges or commissioners, or a master, ordinary or extraordinary, in Chancery, as the said Court may in any case direct, or as the Lord Chancellor may from time to time prescribe, by any general rule to be made by virtue of this act."—1 & 2 Will. 4. c. 56. s. 38.

"And whereas the intention of this act is, that the governor and company of the Bank of England should, during the period stated

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in this act (subject nevertheless to such redemption as is described in this act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the thirty-ninth and fortieth years of the reign of His Majesty King George the third aforesaid, as regulated by the said recited act of the seventh year of His late Majesty King George the Fourth, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking: And whereas doubts have arisen as to the construction of the said acts, and as to the extent of such exclusive privilege; and it is expedient that all such doubts should be removed, be it therefore declared and enacted, That any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privileges granted by this act to the said governor and company of the bank of England."—5 & 4 Will. 4. c. 98. s. 3.

"And whereas doubts have been entertained whether by the terms of the said first-recited act the said Court of Review and Subdivision Courts have been effectually made courts of record; and whether the said courts have upon an examination before them the same powers of commitment for the purpose of enforcing discovery as were vested in commissioners of bankrupt under the acts of parliament relating to bankrupts in force at the time of the passing of the said first-recited act; and it is expedient that such doubts be removed, and that such powers as are herein-after mentioned should be given to the several judges and commissioners acting under the authority of the said first-recited act; be it enacted, and it is hereby declared, That the said Court of Review and the said several Subdivision Courts respectively shall henceforth be, and shall be deemed and taken from and after the passing of the said first-recited act to have been, courts of record, and shall and may have and exercise all such powers of commitment as were vested in commissioners of bankrupt acting as such at the time of the passing of the said first-recited act, and shall and may have, use, and exercise all the powers, rights, privileges, and incidents of a court of record, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of His Majesty's courts of law at Westminster; and all orders heretofore pronounced and all

acts done by the said Court of Review and Subdivision Courts respectively shall be deemed and taken to have been pronounced and done by the said courts respectively as courts of record; and every judge or commissioner appointed or to be appointed by virtue of the said first-recited act sitting alone and acting in execution of the duties imposed upon him as such judge or commissioner shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a court of record: Provided always, that nothing herein contained shall be deemed or taken to authorize or empower any such judge or commissioner sitting alone to impose any fine or commit for a contempt of court, but every contempt of any such judge or commissioner sitting alone and acting as aforesaid shall be cognizable by the said Court of Review, to which the same may be referred by any such judge or commissioner as aforesaid; and the said Court of Review shall have full power to deal with the same as a contempt of the said Court of Review: Provided also, that nothing herein contained shall be deemed or taken to diminish or affect the power by the said first-recited act given to any such judge or commissioner of committing any person examined before him to any messenger or other officer of the Court of Bankruptcy."—5 & 6 W. 4. c. 29. s. 25.

"And whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received: And whereas doubts have arisen whether or not such proceeding is illegal; for the more effectual suppression of such practice and removing such doubts, be it enacted, That from and after the commencement of this act it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing

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designed to be used in such foreign countries respectively."—5 & 6 W. 4. c. 62. s. 13.

"Whereas by an act passed in the seventh year of the reign of His late Majesty King George the Fourth, intituled 'An Act for the better regulating copartnerships of certain bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled 'An Act for establishing an agreement with the governor and company of the bank of England for advancing the sum of three millions towards the supply of the service of the year eighteen hundred,' as relates to the same, it was amongst other things enacted, that it should be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnerships, although such persons so united or carrying on business together should consist of more than six in number, to carry on (subject to certain provisions therein contained) the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number might lawfully do; and it was further enacted, that all actions and suits against any persons who might be at any time indebted to any such copartnership carrying on business under the provisions of the said act, and all other proceedings at law and in equity to be instituted on behalf any such copartnership against any persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, might be commenced and prosecuted in the name of any one of the public officers for the time being of such copartnership, to be nominated as therein is mentioned, as the nominal party on behalf of such copartnership, and that actions or suits, and proceedings at law or in equity, to be instituted by any persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, should be commenced and prosecuted against any one or more of the public officers for the time being of such copartnership as the nominal defendant on behalf of such copartnership, and that the death, resignation, removal, or any act of such public officer should not abate or prejudice any such action, suit, or other proceeding commenced against or on behalf of such copartnership, but that the same might be continued in the name of any other of the public officers of such copartnership for the time being: And whereas an act was

passed in the sixth year of the reign of His said late Majesty, intituled 'An Act for the better regulation of copartnerships of certain bankers in Ireland:' And whereas it is expedient that the said acts should for a limited time be amended so far as relates to the powers enabling any such copartnership, not being a body corporate, to sue any of its own members, and the powers enabling any member of any such copartnership, not being a body corporate, to sue the said copartnership: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, That any person now being or having been or who may hereafter be or have been a member of any copartnership now carrying on or which may hereafter carry on the business of banking under the provisions of the said recited acts may, at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said copartnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding at law or in equity against any public officer appointed or to be appointed under the provisions of the said acts to sue and be sued on the behalf of the said copartnership; and that any such public officer may in his own name commence and prosecute any action, suit, or other proceeding at law or in equity against any person being or having been a member of the said copartnership, either alone or jointly with any other person, against whom any such copartnership has or may have any demand whatsoever; and that every person being or having been a member of any such copartnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such copartnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said copartnership; and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers."—1 & 2 Vict. c. 96. s. 1.

"And be it enacted, That no claim or demand which any mem-

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ber of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof."—1 & 2 Vict. c. 96. s. 4.

"And be it enacted, That if any single creditor or any two or more creditors being partners, whose debt shall amount to one hundred pounds or upwards, or any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in Her Majesty's Courts of Bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."—1 & 2 Vict. c. 110. s. 8.

Ex parte JOHN SKERRETTE STUBBS.—In the matter of GEORGE HALL.

L. C.
Jan. 13,
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THE company adopted the course suggested by the Lord Chancellor (*ante*, p. 500.) of presenting a petition (a) by Mr. *Stubbs*, as one of their registered officers; and besides the facts stated in the original petition to the Court of Review, their petition to the Lord Chancellor stated, that an indenture of copartnership or settlement, bearing date the 1st of July 1834, was duly made and executed between the several persons whose names were thereto subscribed, and whose seals are thereunto affixed (except the parties thereto of the second part), and *Cassells* and *Walter* of the other part, for the purpose of regulating the affairs of the company; and such indenture was executed by *Hall*; and it was thereby provided, amongst other things, that every transfer of any share or shares in the capital of the company should be made at the house or office of the company at Manchester, and in such manner as the

It having been the constant practice of the Court of Review to direct that *fiats* be annulled "if the Lord Chancellor shall think fit," and not merely to confine their order to the reversal of the adjudication under the 17th section, that practice is confirmed and approved by the Lord Chancellor.

The Court of Review having on the bankrupt's petition made an order to annul the *fiat*, instead of to reverse the adjudication merely, and the *fiat* having been annulled by the Lord Chancellor in pursuance thereof, according to the usual practice, the petitioning creditor applied for a special case; but owing, to the shape in which it was settled, declined to avail himself of it, and addressed an original petition to the Lord Chancellor praying that *his* order annulling the *fiat* might be discharged, because founded on an order of the Court of Review, which that Court had no jurisdiction to make, and praying for a writ of *procedendo*. The question of supersedeas turned on questions of fact. Held, that this was in substance an application to try the merits of the supersedeas; that the Lord Chancellor had no original jurisdiction to do so, the parties having been before the Court of Review; that they were bound by the special case as settled, which settlement was final; and the Lord Chancellor could not go into the question of its propriety, or exercise the discretion given him by section 3, to hear the case otherwise than by special case.

(a) A typographical error has crept into a note at p. 341, *ante*, to the effect that the Lord Chancellor heard this case of *ex parte* *Stubbs* otherwise than on the special case. The note there should have stood thus:—"This was refused in *ex parte* *Stubbs*," &c.

Arguendo, Court of Review has no power to annul a *fiat*, only to reverse adjudication. *Ex parte* *Keys*, 3 Dea. & C. 263; 1 M. & A. 226; commented on. Contrary to Lord *Brougham*, in *ex parte* *Keys*, *supra*, Lord *Cottenham* refused to make an order to hear a matter by way of appeal from the Court of Review upon petition, or otherwise than by special case, and to leave the respondents to apply to discharge the order.

Arguendo, Court of Review has power to determine questions of supersedeas.

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board of Manchester directors should prescribe; and that every deed of transfer should be prepared, under the direction of the board, at the expense of the person to whom such transfer might be made; and, when executed by the necessary parties, should be deposited and kept in the house or office of the company at Manchester. That the method prescribed by the directors, and invariably pursued, upon every transfer of shares, was as follows:—A notice in writing, or a printed form filled up, requiring a transfer of any particular share or shares, was left at the bank by the person desiring to make such transfer. On the afternoon of Monday in each the board of directors of the said bank met to allow or disallow the transfers mentioned in such notices. If the directors permitted the transfers to be made, intimation thereof was given to, and the transfers were prepared by, the chief accountant, and on payment for the stamp, and one shilling per share for transfer fees, the deed of transfer was delivered to the parties for execution. When the transfers were duly executed they were returned to the bank, and the shares were then, and not before, carried by the chief accountant from the account of the seller to that of the buyer. That Mr. *James Ramsay Lyle* was the chief accountant at the times when such contracts are alleged to have been made, and the bill and promissory note were, as it is alleged, handed by *Hall* to *Lyle*, who entered them in *Hall's* pass-book with the bank to his credit, and also entered them in the private ledger of the bank, and also entered the bill of exchange in the private journal of the bank. But no other entry of the bill or promissory note was made in any of the books of the bank, nor was the bill or the promissory note paid to the cashier of the bank, as in the usual and ordinary course of the business of the bank the same ought to

have been, before any credit in respect thereof should have been entered in *Hall's* pass-book, nor was the bill or promissory note ever handed to or in the possession of the manager of the bank, who was the proper person to have received and kept the same, if they had been paid to the bank in the ordinary course of business; but the alleged contract for the sale of the three hundred and forty-five shares, and of the five hundred shares, if the same took place, was a private transaction between *Hall* and *Moult*.

(The petition then went on to state the order of the Court of Review, and the tender and transactions relative to the special case, already detailed in argument, and proceeded as follows:—)

“ That your petitioner is, therefore, without any means of appealing from the said order of the Court of Review, unless your Lordship shall be pleased to direct such appeal to be heard otherwise than by special case. That an order has been made by your Lordship, founded upon the said order of the Court of Review, and bearing date the 29th day of November 1838, whereby your Lordship has ordered that the said fiat so issued against the said *George Hall* should be and the same was thereby annulled. That your petitioner is advised, and humbly submits, that, notwithstanding the said order of the Court of Review, and your Lordship's said order thereupon, your lordship has original jurisdiction in the matters aforesaid, and that it is competent to your Lordship to hear and decide upon the matters herein stated, and to discharge your Lordship's said order for rescinding or annulling the said fiat, and thereupon to order that the said fiat shall be proceeded with, as your petitioner humbly insists the same ought to be.

“ Your petitioner, therefore, humbly prays your Lordship, that your Lordship's said order, bearing date

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the 29th day of November 1838, may be discharged, and that a writ of *procedendo* may forthwith issue directed to the commissioners named in the said fiat, commanding them, notwithstanding your Lordship's said order, and the said order of the Court of Review, to proceed with the said fiat, and that this said fiat may be effectually proceeded with accordingly; and that, for the purposes aforesaid, all such orders and directions as to your Lordship shall seem meet may be made and given;" and for costs. (a)

Mr. Swanston, Mr. Wightman, and Mr. Bacon :—

Your Lordship was pleased to direct this to be placed in the paper, for the purpose, in the first place, of arguing the question of jurisdiction. Your Lordship is already in possession of an outline of the case.

According to a practice which has prevailed, we in the first place applied to the judges of the Court of Review to settle a special case, in order that we might come by appeal before your Lordship; but, as already stated to your Lordship, the manner in which that special case was settled put it entirely out of our power to bring the case before you. The grounds upon which we ask that your Lordship will be pleased either to discharge your order of the 29th November last, or to issue a writ of *procedendo*, or to take such other course as may enable us to bring before your Lordship the merits of this case, in order that we may have your judgment upon the question, are, first, of the legal validity of the fiat, and, next, of the existence or non-existence of any equitable objection to it.

1 & 2 W. 4. c. 56.
 s. 2.

By the 1st and 2d W. 4. c. 56. s. 2. it is enacted,
 " That the said judges, or any three of them, shall and may form a Court of Review, which shall always sit in

(a) The petition is thus fully stated, on account of its unusual nature.

public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act, or may be by the said rules and regulations, assigned and referred to the said Court of Review." The 12th section empowers the Lord Chancellor to issue a fiat in lieu of a commission; no such proceeding as a fiat in bankruptcy being known before this act. It is a proceeding created by the act; and, according to our view of that act, it is a proceeding of the Lord Chancellor. It is enacted, "That in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice Chancellor, and each of the masters of the Court of Chancery acting under any appointment by the Lord Chancellor, to be given for that purpose, on petition made to the Lord Chancellor, against any trader having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same elsewhere before such discreet

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1 & 2 W. 4. c. 56.
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s. 17.

and proper persons as the Lord Chancellor, or as the Master of the Rolls, Vice Chancellor, or one of the masters of the Court of Chancery, acting as aforesaid, by such fiat may think fit to nominate and appoint; and that the persons so appointed shall thereby have the like power and authority to all intents and purposes as if they were assigned and appointed special commissioners by virtue of a commission under the great seal." So that it is competent to the Lord Chancellor alone to issue the fiat. It cannot be pretended that any other jurisdiction is competent to issue a fiat. Then the 16th section merely provides, "That all the laws and statutes, rules and orders, now in force relating to bankrupts or to commissions of bankrupt, or to proceedings under such commissions, or to the subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject matters of such proceedings, and to all persons concerned therein or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the great seal of the united kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act." It cannot in the slightest degree touch the jurisdiction of your Lordship; it intended merely to give effect to the proceedings under the fiat; to render applicable to them that course of proceeding which previously prevailed with reference to a commission. The next three sections are those on which the question turns. The 17th section provides, "That if any trader adjudged bankrupt shall be minded to dispute such

adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the united kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the said court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication, by a jury, to be duly impannelled and sworn for that purpose, before the Chief Judge or any one or more of the other judges of the Court of bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict, or such adjudication of the said commissioner, shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: providing always, that an appeal shall be to

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the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only." That was a proceeding created by this act; there was nothing analogous to it known before. The petition which is referred to here, is not a petition to annul a fiat; neither under that section is it competent to any court to make an order annulling a fiat. No such authority is given by that section. It is a jurisdiction to reverse the adjudication. A course of proceeding which was previously unknown. By the 18th section (*a*), reversing the adjudication was to be the foundation of an order to annul the fiat. The adjudication was to be reversed by the Court of Review. The 17th section (*b*) gives it jurisdiction for that purpose. They had not jurisdiction to annul the fiat, but the reversal of the adjudication would be a ground for the Lord Chancellor to annul the fiat. The 19th section declares, "That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the existing laws and practice in bankruptcy." It would seem to be perfectly clear that the issuing of the fiat is undoubtedly the act of the Lord Chancellor; an act which cannot be done by any other individual; so that the annulling the fiat is exclusively within the province of your Lordship's jurisdiction. The 17th section (*b*) has nothing more to do with the annulling than with the question of issuing. That is a proceeding for reversing the adjudication; and, notwithstanding the re-

1 & 2 W. 4. c. 56.
s. 19.

(a) *Post*, Appendix, p. 568.*(b)* *Ante*, p. 516.

versing of the adjudication, it is possible there may be a refusal to annul the fiat; that has actually happened. The Court of Review, according to a practice of hearing and determining upon petitions to annul, have actually refused to annul a fiat upon a petition presented for that purpose, where its own order was in force reversing the adjudication. That is a reported case. (a) We would submit to your Lordship, upon the proceeding which has here taken place, the order which we complain of is, first, a petition by Mr. *Hall*, not presented under the 17th section (b); it is a petition not praying to reverse the adjudication; it is a petition praying to annul the fiat; and the order made by the Court of Review is not an order reversing the adjudication, but to annul the fiat. It is an order made by a court which has no jurisdiction to make it; and, accordingly, the parties knowing that, they came to your Lordship, and from your Lordship obtained an order on 29th November last, which is an effectual annulling of the fiat; and it is that of which we complain.

The proceeding under the 17th section (b) is a totally distinct proceeding from a petition to annul a fiat addressed to the general jurisdiction, wherever it may exist, for that purpose. That it should be addressed to your Lordship, according to this act, has been settled in practice from the very first opportunity of passing a construction upon this act in *ex parte Palmer*. (c) The question there was, whether a bankrupt could present a petition to supersede after the two months had elapsed. Your Lordship observes that by the 17th section (b) the bankrupt, being resident here, must present a petition

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Court of Review has no power to annul the fiat; only to reverse adjudication—*Arg.*

(a) *Ex parte Harwood*, 3 *Dea. & Ch.* 252; *ex parte Keys*, 3 *D. & C.* 263, *S. C.* 1 *M. & A.* 226.

(b) *Ante*, p. 516.

(c) 1 *Dea. & Ch.* 341; *Mont.* 497.

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under that section within the two months. The petition there was presented after two months. It is very true that a portion of the time had elapsed before the court originated, and it was a case which might undoubtedly be reconciled with a different course of decision; however, no such different course of decision has taken place. It is a matter of daily practice to entertain jurisdiction upon petitions to annul; an instance of which is the very case before your Lordship; the order which we deprecate. The question there was, whether the 17th section (a) did not exclude the bankrupt from his right to question the validity of the fiat in any other manner. Their Honours were unanimous in the negative; and Sir George Rose says, "There does not appear to me to be the least foundation for this objection. Before the bankruptcy court act a bankrupt might at any time have presented his petition to supersede the commission, without any restriction whatever. Then are there any words in the 17th section (a) to limit the jurisdiction of this Court? I think that clause does nothing more than give a benefit to the bankrupt, without excluding the general jurisdiction of the Court given by the 2d section. (b) Let us see how the bankrupt stood before this act came into operation. The bankrupt was then driven to an action, at the peril of all the costs; for an issue was only given at the discretion of the Court. The section in question provides that the adjudication shall fall to the ground if he presents his petition within two calendar months from the date of the adjudication, and the intention of the act, as declared in the preamble, is, that the rights, as well of the bankrupts themselves as of other creditors, may be enforced with as little expense, delay, and uncertainty as possible. Now,

(a) *Ante*, p. 516.

(b) *Ante*, p. 514.

where do we find any thing in the act that gives the bankrupt any rights, except in this particular section? I have no hesitation, therefore, in deciding that the operation of this clause is merely to give the bankrupt a right which he did not possess before; and that the Court has jurisdiction to entertain this petition, though presented after two calendar months from the date of the adjudication." Accordingly that has been the settled course of practice, and it would seem very difficult indeed, whatever might have been the intention, to hold that this bankrupt could be excluded from his right to present a petition to annul, because there is a power given to annul most undoubtedly with reference to reversal of adjudication; because it is competent to the Lord Chancellor, under that section, to annul upon the reversal of any adjudication, or for such other cause as he shall think fit. There must, therefore, be some means of bringing before your Lordship the grounds for annulling the fiat, independent of the reversal of the adjudication, and the practice has been settled ever since, that it was competent to the bankrupt to follow the old practice of presenting a petition to annul, passing over entirely the 17th section. (a) If the 17th section (a) is to be set out of the question, it is difficult to comprehend how there can be any doubt in the case; because it might as well be argued that the Court of Review might issue the fiat as annul a fiat. The fiat is the creature of this statute; the fiat by this statute is expressly a proceeding of the Lord Chancellor; the annulling of the fiat is expressly a jurisdiction given to the Lord Chancellor. If the proceeding under the 17th section (a) were co-extensive with the order to annul,—that is, if there never could be

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an order to annul unless there were some proceeding under the 17th section (a), we could understand the argument why the 19th section (b) is introduced: because it might undoubtedly be that the Court would think itself warranted to act upon the proceedings of another court under the 17th section (a), and there would be an obvious reason why the words are introduced into the 19th section. But, as the proceeding under the 17th section (a) is of a limited nature, directed to reversal of adjudication only, there must be an end of that argument. Now, your Lordship will perceive that this 17th section (a) is one of very stringent operation, both as it affects creditors and bankrupts; as it affects bankrupts it is most stringent, because it makes the determination under it a final proceeding; and not only that, but if he does not avail himself of this proceeding within the time limited, that which has taken place is final; on the other hand, it gives to the bankrupt a right which he never had before,—it gives to him, as a matter of legal right, an issue. That I conceive was before in the discretion of the Court. If the Court is satisfied against the bankrupt upon his own showing, it never was considered the duty of the Court to involve the estate in further expense; the Court, entertaining no doubt, had to decide the question. That cannot be done now; if the bankrupt demand an issue, right or wrong, he must have it. Not only that, but the bankrupt can take this proceeding without surrender. It is now the settled practice, resting at present upon the authority of a series of decisions in the Court of Review, and some of them trying the question by the severest test, which absolutely excludes the bankrupt from presenting a petition to annul, if that petition is presented after the time for his surrender has

(a) *Ante*, p. 516.

(b) *Ante*, p. 518.

expired without surrendering. (a) Under this section he may present a petition, because there is no qualification here, within two months, whether the forty-two days have expired or not: it is as much his right to maintain such a petition as it is the creditor's right to maintain the fiat. It is plain that this 17th section (b) introduces a peculiar proceeding directed to the reversal of the adjudication, and having an important operation both on the bankrupt and the creditor,—in short, of all persons interested in the proceeding, the validity of which is to be brought into question in this manner. Allusion was made upon a former occasion to the course of practice which has prevailed in the Court of Chancery, where the decrees of the Master of the Rolls and the Vice Chancellor are signed by the Lord Chancellor before they are enrolled. It seemed to be considered, for a time at least, that there was some analogy between those cases and the present. (c) With great submission, that analogy is not substantial. In the present case our argument amounts to this; that the Court of Review has no jurisdiction to make the order to annul. [The LORD CHANCELLOR:—If you allude to any thing I said, it has no reference to decrees before they are enrolled. The process of contempt under the great seal issues by the authority of the Chancellor, in pursuance of orders

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(a) *Ex parte Drake*, 2 Dea. & Jones, 11 Ves. 409; 8 Ves. 328; Ch. 91; Mont. 486; *ex parte ex parte Roberts*, 1 Mad. 72; *ex Clarke*, 2 D. & Ch. 194, S. C. *parte Wilkinson*, 1 G. & J. 387; M. & B. 379; *ex parte Palmer*, *ex parte Peaker*, 2 G. & J. 337; 1 Dea. & Ch. 341. 371. S. C. cont. *ex parte Nichols*, 2 G. & J. Mont. 497; *ex parte Knowlson*, 101; *ex parte Hopkins*, 1 Rose, 3 D. & C. 191; Mont. & B. 416; 228; *ex parte Carling*, 2 G. & J. *ex parte Levi*, 2 Mont. & A. 685; 35.
ex parte Kirkman, 3 D. & C. 450; (b) *Ante*, p. 516.
1 M. & A. 709; cont. *ex parte* (c) *Ante*, p. 497.
Glynn, Mont. 124; *ex parte*

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made before one of the other judges, and which Lord *Eldon* used to withhold if he did not conceive there was a sufficient case to warrant its exercise. Nobody ever doubted the jurisdiction of the other judges.]—Their decrees are valid; the signature of the Lord Chancellor does not give them validity.—[The LORD CHANCELLOR:—It is his order under which they pass the great seal; it is, in short, precisely the same as that which is reserved under the 18th section. (a) The act itself which is to give effect to the order must be the act of the Chancellor, but the order which is the foundation of that act proceeds from one of the other judges. Take, for instance, an order for commitment.]—The judges would have jurisdiction to make the order. That is the distinction.—[The LORD CHANCELLOR:—But not to carry it into effect.]—It might not, any more than the decree of the Master of the Rolls; it cannot, for instance, be enrolled until it is signed by the Lord Chancellor.—[The LORD CHANCELLOR:—The enrolment is not necessary to give it effect.]—Certainly not. That is the distinction. It is not at all necessary to give it effect; and the difference is this, that the decree there is the decree of competent jurisdiction. The court has jurisdiction to make the decree, but the Court of Review has no jurisdiction to make this order.—[The LORD CHANCELLOR:—If you mix it up with the question of enrolling the decree, you do not advert to the observation that I made. My observation had nothing to do with a decree enrolled; but it was, that an order of commitment cannot have effect until it receives the sanction of the Lord Chancellor, and yet it is as complete an order as if made by the Master of the Rolls or the Vice Chancellor; and for this reason, because it requires the

(a) *Post*, Appendix, p. 568.

great seal.]—Yes; then it would be competent to them to come to the great seal to discharge that order.—[The LORD CHANCELLOR :—By way of appeal undoubtedly, but not otherwise. If the Master of the Rolls or the Vice Chancellor make an order for commitment which requires the great seal to give it effect, no doubt the party may come here to have it discharged, if they quarrel with it. Then the question is, in what way you come; if you come here as appellants, the act prescribes the way in which you are to come. You are not appellants; the only ground upon which you can maintain your right is that you are not appellants.]—We are not appellants; because we say that under the act there is no jurisdiction to make the order. We say the order that we deprecate is your Lordship's order, and that is the order which we now seek to discharge.—[The LORD CHANCELLOR :—If the Master of the Rolls or the Vice Chancellor make an order which requires the great seal before it can be carried into effect, it comes to the great seal without the intervention of the party at all. The great seal may, as in every other act, see cause not to exercise its power; but the party has nothing to do with that. If the party against whom that order is made chooses to come to question that order, he can only come by way of appeal from the order made.]—That would be founded upon this, that the Master of the Rolls and the Vice Chancellor had jurisdiction to make the order.—[The LORD CHANCELLOR :—Undoubtedly.]—The Court of Review had no jurisdiction to make the order. It was not a valid order, but in order to carry it into effect the great seal was required, and that could only be put by the Lord Chancellor. The distinction is that to which we were adverting with regard to decrees; that the order is a valid order, and the great seal does not give additional credit to the order. It gives

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additional efficacy; it carries it into effect and operation; but the order has all the validity which an order can acquire when it is pronounced by the Master of the Rolls or the Vice Chancellor. And the nature of the proceeding there is, not to give additional validity, to the order; it gives additional vigour to it; it gives additional efficacy and operation to it, which it would not acquire otherwise. But here we say there is no order; it is a nullity. The Court of Review might just as well have made any other order. They have no more jurisdiction to make this order than they have to make an order relative to a will. Your Lordship sees the issuing of the fiat is the act of the great seal; the annulling of the fiat is expressly reserved to the great seal, and jurisdiction is not given to the Court of Review over the fiat in any way whatever, and even if they have reversed the adjudication they cannot annul the fiat; application must be made to your Lordship for the latter purpose. A parallel case to the one suggested would be a case where there has been a proceeding upon petition to the Court of Review to reverse the adjudication, where that court made the order, and where it became fit that the fiat should be annulled. The regularity of practice there is, that any application to annul the fiat must be made to your Lordship; but the distinction then would be that the Court of Review has made a valid order; that it has made an order within its jurisdiction. Here is a good reversal of the adjudication, and that is in this statute made a ground—perhaps without the statute it may be a ground—for the Chancellor to annul the fiat, if he thinks fit; but here there is no foundation for your Lordship's order; that is, nothing independent of the order of your Lordship; there is no order but your Lordship's. That the Lord Chancellor has original jurisdiction is a question not new to your Lordship, because it was dis-

cussed before Lord *Brougham* in *ex parte Keys*. (a) The Court of Review there having made an order annulling the fiat, an attempt was made to proceed by special case; some difficulty was found in it, and an application was made to Lord *Brougham* for leave to proceed by way of appeal by petition, and his Lordship, upon an *ex parte* application, acceded to that application. When it came before Lord *Brougham* on the hearing, it appeared that the question was substantially a question of fact; it was submitted to, and there was an end of the appellate jurisdiction. It was no more competent for the Lord Chancellor upon petition to hear that by way of appeal than by special case; and Lord *Brougham*, feeling that, immediately perceived that the real question was, not whether he had appellate jurisdiction, but whether he had original jurisdiction; and accordingly, his mind being addressed to that point, his Lordship says, "Under the act, the great seal has reserved to it all power of annulling fiats in bankruptcy; consequently, the Chancellor has full and ample power, without any qualification, of annulling a fiat, or of refusing so to do; the great seal is not restrained as to annulling fiats by any of the provisions of the 1st & 2d Wm. 4. c. 56. The Court of Review has in fact no power of itself to supersede; it indeed makes an order to that effect, but the great seal issues the supersedeas; the great seal issues the fiat, and the great seal supersedes the fiat, and therefore cannot be controlled in this matter by the section as to appeals." But when his Lordship says, "It indeed makes an order to that effect but the great seal issues the supersedeas," it might certainly appear that there was some analogy suggested between the cases to which your Lordship has alluded, where the

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(a) 3 *Dea. & Ch.* 263; 1 *M. & A.* 226.

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order is a valid order; but Lord *Brougham* had just stated that they have no power to make the order, which I apprehend is not merely no analogy, but is in direct contradiction to those cases. Lord *Brougham* proceeds, "The Court of Review appears to me to have no power to supersede, under the act. The power of annulling fiats is not taken from the great seal; and with issuing fiats the Court of Review has nothing to do. The section does not convey away the power the great seal possessed, but gives a new mode of exercising it, and says, annulling a fiat shall have all the effect of the old supersedeas, and leaves every thing else just where it was; it leaves the great seal a substantive control in cases of supersedeas." This view of the case clearly entitles the great seal to entertain this question. That would be enough for us, as we humbly apprehend; because if your Lordship has jurisdiction, of course the suitor is entitled to come to ask of your Lordship to exercise your judgment, whether this is a fit case in which the jurisdiction should be exercised. That does not rest only upon the authority of Lord *Brougham*, because the same question came before Lord *Lyndhurst*. I find a short note of that in the matter of *Chambers*. (a) In that case Lord *Lyndhurst* said he saw no reason to depart from Lord *Brougham*'s determination in *re Nokes*, and in *ex parte Keys* in the matter of *Terry*, that the jurisdiction of annulling a fiat was not taken away from the Lord Chancellor by the 1st & 2d Wm. 4. c. 56. How it could be "taken away" one does not understand, because it did not exist before. It was a proceeding under that act; and the act which introduced the proceeding expressly gave the great seal the power of issuing and annulling, and gives it to no other individual. The case of *ex*

(a) 4 Dea. & Ch. 578.

parte Chambers occupied much time in discussion before the Lords Commissioners. That was a petition to supersede, and in that not the slightest doubt was entertained of the competency of the Court to entertain that question. If there is jurisdiction to entertain a petition to supersede a fiat, they must to that extent be placed in exactly parallel positions. Now, my Lord, we are not here arguing a speculative point. It is a point of the greatest importance to the interest of these parties; because, unless your Lordship is open, either in this way, by entertaining original jurisdiction, to give them an opportunity of bringing before you the merits of the case, or permitting an appeal by petition, we feel, as strongly as suitors can feel, and we mean to express, as respectfully as suitors ought to do, that justice will not be done to us in this case.

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The LORD CHANCELLOR:—As I understand, from the commencement, fiats have been annulled, as a matter quite of course, upon the authority of the Court of Review. It has been considered that under this act the Court of Review has jurisdiction. As I understand, in *ex parte Keys*, Lord Brougham, finding that it was a matter of fact, refused to interfere.

Ex parte Keys,
3 D. & C. 263;
1 M. & A. 226;
commented on.

Mr. Swanston:—He made the order discharging his own order.

The LORD CHANCELLOR:—I understand he considered that if it had been a matter of fact he would have had no power, under the act, to interfere. How is that consistent with the present argument? Because the 3d section (a) only restricts the Chancellor in cases of appeal. If he thought the Court of Review had no jurisdiction, he could not have considered it matter of appeal.

Mr. Swanston:—His Lordship said, “This being a

(a) *Ante*, p. 504.

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question of fact, I have no jurisdiction as a court of appeal."

The LORD CHANCELLOR:—Why not? According to the argument, it was not a matter of appeal at all. There could be no appeal from a court which has no jurisdiction.

Mr. *Swanston*:—That was the view taken by Lord *Brougham*.

The LORD CHANCELLOR:—I want to know if you can explain that. The view Lord *Brougham* took of it seems to have been that the Court of Review had jurisdiction. If the jurisdiction of the great seal in matters of annulling fiats or superseding commissions is unaffected by this act,—which is the argument,—then this Court must deal with matters of fact, because no other court has power to do so. The Chancellor has either to deal with it as matter of appeal, or as matter of original jurisdiction. If it is matter of appeal, it assumes the jurisdiction of the inferior court. If it is matter of original jurisdiction, this Court is not confined to matters of law.

Mr. *Swanston*:—That case came before Lord *Brougham* upon a petition of appeal. The application was made to the appellate jurisdiction. It appeared, in the course of the argument, that the question was a question of fact. It was objected that there was no jurisdiction upon appeal; which was admitted on all hands; but Lord *Brougham* said, "I have original jurisdiction, and I will exercise it."

The LORD CHANCELLOR:—Supposing it had been matter of law, there is nothing in the judgment of Lord *Brougham* to show he would have considered that he could not deal with it as a matter of appeal; on the contrary, he would. That assumes that the Court of Review has jurisdiction.

Mr. *Swanston*:—We cite that judgment to show his

Lordship's decided opinion that he had an original jurisdiction. He exercised the original jurisdiction; and if we are wrong, we say that Lord *Brougham's* order is wrong; it cannot stand upon any other foundation than the original jurisdiction.

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The LORD CHANCELLOR:—It comes to this: the case of *ex parte Keys* is cited on your side as an authority upon which you stand. I want to know whether you can reconcile what is said to have fallen from Lord *Brougham* with the case you now make; namely, that in his opinion the Court of Review had no jurisdiction, and therefore he could not entertain it, whatever the question of appeal might be, as a matter of appeal.

Mr. *Swanston*:—We think Lord *Brougham* would have done exactly as he did, that being his reason; and we conceive that that was his reason.

The LORD CHANCELLOR:—Do you cite that as an authority for showing that Lord *Brougham* was of opinion that the Court of Review had no jurisdiction? Because it seems to me to prove directly the reverse.

Mr. *Swanston*:—No; that the Chancellor had original jurisdiction.

The LORD CHANCELLOR:—Does it not assume that the Court of Review has jurisdiction? Because the ground of his decision is, that he could not deal with it as a matter of fact. If you put it that it was so because it came before him by appeal, then if it had not been matter of fact, but matter of law, would he not have had jurisdiction?

Mr. *Swanston*:—We suppose he would have exercised jurisdiction.

The LORD CHANCELLOR:—Then, so far from its being the opinion of Lord *Brougham* that he had no jurisdiction, the whole ground which he proceeds upon

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assumes that he had. Then it comes to a part of the case not touched. If the Court of Review had jurisdiction, and it came by way of appeal, there is a clause prohibiting your coming.

Mr. *Swanston* :— We put it upon the statute, that the Court of Review has no original jurisdiction. We cite Lord *Brougham's* decision for this proposition, that the Lord Chancellor has an original jurisdiction.

The LORD CHANCELLOR :— The argument is very different, whether the Court of Review has jurisdiction or not. I want to know what view you take of that case. If you say that no court has jurisdiction to deal with these matters but the great seal, that I can understand ; but I do not very well understand, assuming that the Court of Review has jurisdiction, how, after the party has failed before the Court of Review, he can come here upon an original application.

Mr. *Swanston* :— We deny altogether that the Court of Review has jurisdiction. We do not cite that opinion of Lord *Brougham's* as direct authority for that proposition. The proposition for which we cite it is one from which the other necessarily flows, that the Lord Chancellor has original jurisdiction over the annulling of the fiat ; and in fact Lord *Brougham's* order cannot stand except on that foundation ; that confirms our argument. It is quite clear that the jurisdiction is given to the Lord Chancellor there. Where is it given to the Court of Review ?

The LORD CHANCELLOR :— I can understand the way you put it, that the Court of Review has no jurisdiction at all ; but I cannot understand, supposing the Court of Review to have jurisdiction, and that this Court is prohibited from dealing with any matter, except matter of law, upon appeal, how you are to turn round and say, “ we will not look at it as an appeal, but as an

original application." It is creeping out of the provisions of the act entirely, merely by calling a thing by a different name.

Mr. *Swanston* :—The original jurisdiction ought to have been exercised in another way.

The LORD CHANCELLOR :—Then it comes to this : whether by possibility it could have been the intention of those who framed this act, and the legislature who passed it, to take away the jurisdiction in bankruptcy from the great seal, and to appoint a court for the express purpose, and then leaving to the great seal that which constitutes by far the greater part of the business in bankruptcy, namely, the question of supersedeas ; because, although that is very much limited by taking away the questions upon concerted commissions, we all know that before that time by far the greater portion of the time of the Court was occupied in questions of superseding commissions. That was a great grievance for a time.

Mr. *Swanston* :—Probably there might be this difficulty : as it was the plan of the legislature to keep the fiat, which was analogous to the commission, the act of the great seal, how could that be done by an inferior tribunal ?

The LORD CHANCELLOR :—That was the reason I called your attention to the practice of this Court, that although the thing itself is carried into effect by the great seal, the power of adjudicating upon it is given to another branch of the Court.

Mr. *Swanston* :—We do not know whether your Lordship overrules our distinction, that in those cases the court below has jurisdiction to make the order.

The LORD CHANCELLOR :—That is begging the question. You say that the Court of Bankruptcy cannot have jurisdiction, because the power of annulling a fiat

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is reserved to the great seal. I say that argument cannot hold, because we have an instance in this Court where precisely the same thing takes place. No doubt the other branches of the Court have jurisdiction; but the mode of proceeding cannot be used as an argument to show that the Court of Review have no jurisdiction, because it is acknowledged that the other branches of the Court have jurisdiction.

Mr. Swanston :—The orders to which your Lordship adverts are orders made by virtue of that power inherent in a court of record, and the mode of giving effect to them is by the great seal; but what gives the Court of Review more power over a fiat than the Court of Common Pleas? It might as well be said that the Court of Queen's Bench could annul a fiat.

The LORD CHANCELLOR :—I was referring to your argument that the Court of Review cannot have it because the power of carrying it into effect is reserved to the great seal.

Mr. Wigram :—In the case of *ex parte Keys* a petition had been presented, praying that Lord *Brougham* would hear the case upon petition, and not by special case; and the reason why Lord *Brougham* heard it was this: that he had made an order for so hearing it. He said, "I have made an order for so hearing it; you, the respondents, have not applied to discharge it, therefore I give you an appeal in this way;" and he heard it as an appeal.

Mr. Swanston :—That is what we say. But then, upon the appeal, it appearing that it was a question of fact, he said, "This is all wrong: I cannot make the order as a court of appeal; what shall I do with it? I will not dismiss the case; I will make the order by virtue of my original jurisdiction."

Mr. *Wigram*, Mr. *Anderdon*, and Mr. *Geldart* for Mr. *Hall* the bankrupt:—

The whole course of proceeding admits, that this is a case in which you must have the facts brought before you, that your Lordship may do justice between the parties; but yet the argument upon which your Lordship is asked to act is this; that, let the merits be what they may, assuming, for the purpose of the argument, that every thing is right on our side, and that every thing is wrong on their side, that the Court of Review have taken the liberty of dealing with the order of your Lordship (namely, the order directing the fiat to issue,) when they have no power to do so. It amounts to this: that as there is an order of that court annulling the fiat although they know it to be a nullity, that it is not a case of appeal because they say that the court had no jurisdiction to make the order, but they merely come to your Lordship and ask you to get rid of the order which the Court of Review has made, on the ground that they have improperly dealt with the order of your Lordship; and in that way they mean to say that this is not an appeal. Ever since the Court of Review has existed it has been considered that they had an original jurisdiction to annul fiats; and that that 17th section (a) gave certain powers, privileges, and advantages to a bankrupt who thought fit to proceed under it, but does not in any way whatever take away from the general operation of the words of the act, which in the largest possible manner transfer to the Court of Review every power which is not expressly reserved to the Lord Chancellor. Accordingly, these parties went before the Court of Review. The jurisdiction of the court was never for one moment objected to until now. The whole case, therefore, which

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they call upon us to meet them here upon is, that a certain subject came before the Court of Review; that the jurisdiction never was disputed; that every thing turned upon the merits; that they themselves began by carrying in a special case to be settled by the judge; that the judge settled another; that some alterations took place; and at last they are reduced to this,—that, as they cannot get the case stated and settled according to their view of it, —and according to the act of parliament they themselves admit, as we understand by this petition, that they cannot appeal, because if it was a question of fact the jurisdiction of the Court would be excluded,—therefore they say, that under the 3d section (a) of the act your Lordship has power to hear this case otherwise than upon a special case to be certified by the judge.—[The LORD CHANCELLOR:—When the application was first made to me it was founded upon that power which I have of hearing otherwise than upon a special case. That was assuming the jurisdiction of the Court of Review.] [Mr. *Stanton*:—Then I took the liberty of putting it, that at all events the great seal had original jurisdiction. The petition is adapted to that view of it, and no other.] [The LORD CHANCELLOR:—Your petition is prepared undoubtedly for raising that question.]—To say that it was an application to your Lordship to hear it under the original jurisdiction is contradictory to the whole argument; because, if the case is not one by way of appeal, but in which they apply to the original jurisdiction of the Court, they want no order of the Court to come here; because what they say is, that a petition was presented, in which the Court of Review had no jurisdiction at all, but that the parties, out of respect to the Court of Review, cannot act against this order, though it be a nullity, and therefore they are obliged to come to your Lordship.

(a) *Ante*, p. 504.

The LORD CHANCELLOR:—It was put, I recollect, by Mr. *Swanston* in this way: Lord *Brougham* thought the best way was to make the order as of course, leaving the other party to move to discharge it. I thought that was not the best course, but that it was a useless proceeding. Supposing I had acceded to that practice; the order would have been, that the party might have proceeded by petition instead of special case. The only question now before me, and the only question I gave the parties leave to agitate, was, not to make an order in the first instance, because I thought that a useless proceeding, but to call the other parties here, in the first instance, to discuss the merits of the application which was made. What was the application? That they might be permitted to prosecute the appeal by petition instead of special case. Therefore it is rather taking the party by surprise to abandon the whole case on petition, and now pretend that it is not an appeal at all. Besides, if it is no appeal, what is the use of all this statement of what took place.

Mr. *Swanston*:—It was distinctly stated that there was a question of original jurisdiction, besides the question whether we might proceed by petition instead of special case, which would have satisfied us, not entering into the question of original jurisdiction, your Lordship being pleased to intimate a doubt; and I took the liberty of referring to this decision of Lord *Brougham's* that you had jurisdiction, and to ask your permission to argue that question, whether we might not apply to discharge your order of supersedeas, and issue a writ of *procedendo*. Upon re-consideration it was agreed that Mr. *Bacon* should ask of your Lordship more distinctly permission to present a petition, which was given. The question to be argued was the original jurisdiction.

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Contrary to Lord Brougham in *Ex parte Keys* (supra), Lord Cottenham refused to make an order to hear a matter by way of appeal from the Court of Review, upon petition or otherwise than by special case, and to leave the respondents to apply to discharge the order.

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*Mr. Wigram, Mr. Anderdon, and Mr. Geldart:—*Are they at all in a different position because this is a question of jurisdiction? Suppose the Vice Chancellor makes an order upon which your Lordship thinks the Court has no jurisdiction, and that question comes before this Court by way of appeal. Whatever the Court of Review orders is considered as the order of the great seal, because in the same way it may be brought under the great seal for the purpose of being reviewed; therefore, whether the Court of Review, exceeding its jurisdiction, or whether the Court of Review, acting within its jurisdiction, makes a wrong order, it is the same as the case of a question coming before your Lordship in which you are to decide whether the Court of Review had jurisdiction.—[The LORD CHANCELLOR:—They do not in form quarrel with the order of the Court of Review. They say they quarrel with my order founded upon the order of the Court of Review.]—Your Lordship's making an order is, in point of fact, giving effect to the order of the Court of Review. It is undoubtedly that; but it is nothing more, as your Lordship puts it, than the ordinary case, in which an order made by one of the judges of the court below is ineffectual until the great seal has been put to it; and the power has been reserved here for the Court to make that order; therefore it is, in truth and in fact, your Lordship's order. How does that at all alter the case? They are here only now to argue the question of jurisdiction. If they say this is your Lordship's order, then we understand this to be merely an application to rehear an order which you, in point of fact, have made. It is either your Lordship's order, or it is not your Lordship's order; it has become your Lordship's order upon a certain case acted upon by the Court of Review, and they come to your Lordship now to rehear your own order, by which you adopted

what the Court of Review had done. Then they say, your Lordship has done that which you would not have done if the merits of the case were before you. That is their argument; that the Court of Review made the order; that your Lordship has improvidently adopted that order, and made it your own; and that it is your Lordship's order which they ask you to rehear. Upon what terms? Upon the merits: because they go wholly into the case, to show that if the merits were before your Lordship you would not annul the fiat; and they without hesitation, admit that if your Lordship shall, upon hearing the merits of this case, be of opinion that the fiat ought to be annulled, then you will not disturb the order; and all that they ask is to bring the merits before you. And what would be the result of taking a different course? Do they mean to say that the question can ever be finally disposed of without going into the merits? Do they mean to say, where we have the judgment of one court with us, holding that this fiat was improperly issued, and that this gentleman ought not to have been made a bankrupt, that the case must not be discussed upon its merits? Of course it must, under some form or other; therefore what good could result from getting this disposed of merely upon the ground of informality? But their argument appears to exclude the informality, because they admit that your Lordship, having the case before you in point of fact, made the order. Now they ask your Lordship to rehear your own order, and to re-hear it upon the facts brought before the Court, because they say the only difficulty they have is, that they cannot get the merits of the case truly before your Lordship. In any view of the case, therefore, they open it to your lordship to look into the merits of the case; and then the question is, what order ought your Lordship to make upon the

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present application. If the case be one which you are to hear as an order you have adopted of the Court of Review, the question is, is it not to come before you in the ordinary way? There are two points we submit; one is, that the Court of Review clearly and distinctly had an original jurisdiction to make the order, and if so, then that this case depending upon facts can come before your Lordship under the act only by means of a special case; that the act is quite exclusive except for the purpose of raising that question.

The powers which the act gives are in the preamble(a); and power is given to erect and establish the Court of Review. Then it goes on to enact what shall be done: "And the same court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record; and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed by any of his Majesty's courts of law or judges at Westminster." Then by the 2d section it is enacted, "That the said judges, or any three of them, shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere,

Court of Review has power to determine questions of supersedeas, subject to Lord Chancellor's confirmation, *Arg.*

(a) 1 & 2 W. 4. c. 56.

except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act, or may be by the said rules and regulations assigned and referred to the Court of Review." Now, my Lord, suppose we stop here, and you have nothing whatever to guide you as to the jurisdiction of the Court of Review except that section, is it possible for an argument to be raised as to whether or not the intention was to refer to the Court of Review the decision of those questions which, as your Lordship observed, occupy far more time than any others, and which are in truth the questions more frequently litigated than any other class of cases whatever? They are to have the power "to hear and determine, order, and allow, all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor." Upon what possible ground could it be argued there was an exclusion of the particular case of *supersedeas*? Does the 17th section (a) take away the power which is there given? If it rested solely upon this, all that the bankrupt could do would be to come to the Court and petition for a *supersedeas*, and the Court might in that case have refused to do otherwise than decide the case upon such evidence as the bankrupt might be in a condition to bring forward. But the legislature, foreseeing that injustice might be done, as the legislature knew injustice often had been done to bankrupts from there not being a sufficient mode of investigating the particular question of *supersedeas*, one which governed the whole proceeding, therefore the legislature, by the 17th section (a), gives to the trader a power to insist upon having his case tried

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in a particular mode. They say that it does not come under the 17th section (a) : it does not say any thing about the word adjudication. Whether it comes under the 17th section (a), or whether it comes under the general powers of the act, is immaterial. Why should it not come under the 17th section (a) of the act? Because no court ever held that a party's adding such a word as "annul" would take away the power of the court to act upon the petition. But that can only go to this: that the Court of Review have used an irregular word. Put the 17th section (a) out of the case. It has done nothing more than give the bankrupt a right to claim that which, before the 17th section passed, the bankrupt had no power to claim.—

The 1 & 2 W. 4.
c. 56. s. 17. in-
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sumes that the
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tions of super-
sedes.—Per
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cellor.

[The LORD CHANCELLOR:—Your argument is much stronger with that 17th section than without it, because that gives a new remedy, and takes for granted that the Court of Review is to exercise it, because the Court of Review is to exercise it in all other cases.]—The 17th section, as your Lordship now uses it, goes to confirm the argument arising on the 2d. (b) We do not reject it in that way; but when we say we are content to take it without the 17th section, we mean, considering it as a case in which the bankrupt does not exercise the option of having it tried in a particular mode. But taking the section in aid of the 2d section, to show what the meaning of the legislature was, the act of parliament is perfectly conclusive; there are words here, perfectly general, giving the power. The 17th section (a) recognizes the general power to supersede, but gives the bankrupt an option, in a particular case, to say that he will have the question tried in a particular mode. Then how can a

(a) *Ante*, p. 516.(b) *Ante*, p. 514.

question exist with regard to the jurisdiction of the Court? Again, with regard to the question about this Court exercising jurisdiction, look at the case of *ex parte Langston* (a); a case in which Lord *Lyndhurst* (there being a great number of cases of a similar kind before the Court) asked for the assistance of the Vice Chancellor; and the Lord Chancellor and the Vice Chancellor together heard the case argued. The question raised was this: there being a general power given to the Court of Review to hear all cases, whether, if the great seal, before the passing of the act, had made a positive order, the Court of Review could rehear the order made by the great seal, and the conclusion to which the Court came was, that in those particular cases the words of the act were not large enough to give them the power; but with respect to others that they could suppose, they say, the powers are as large and ample as powers can be; and, subject to the qualification they introduce in two or three of those cases, there is not a question about the power of the Court of Review being an identical power with that which the Lord Chancellor sitting in bankruptcy had, before the act in question passed. There are many cases in which questions of this sort have arisen. One is the case of *ex parte Low* in the matter of *Hobson* (b); and that was a case which rather applies to the other branch of the jurisdiction. It was an appeal from a special case of the Court of Review, and an objection was made about the mode of settling the case. The Lord Chancellor expressed a very clear opinion, that the jurisdiction of the great seal to hear could only arise upon a special

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(a) *Mont. & Bl.* 142. *et seq.*; 1 *Dea. & Ch.* 324. *et seq.*

(b) 1 *Mont. & Ayr.* 189. *et seq.*

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case when that special case was settled by the Court of Review ; that the construction of the act was, that which it clearly is, if any argument is to be raised upon it. The bankrupt court act (*a*), by sections 31 and 32 (*b*), taken together, gives an appeal generally on matters of law and equity, and particularly on the admission or rejection of evidence. If then the Court of Review decide on rejecting or admitting evidence improperly, such decision may be appealed against. It might be so, under the general provision, being a matter of law and equity ; and the particular provision as to evidence, on the one hand, contended to have been added, rather for the purpose of making it clear that an appeal should lie in such a case, than to extend the appellate jurisdiction to any cases not within the general provision. From this view of the statute it would follow, that if the court rejected evidence because it considered it superfluous, as not carrying the party's case further, an appeal would not lie for this cause. But it may be said, on the other hand, that the admission and rejection of evidence being specifically mentioned in sections 31. and 32. (*a*) as well as matter of law and equity, something more must be intended than mere objections in point of law ; and that all objections, of whatever kind, are included. But it is unnecessary to decide in the present case between those two constructions ; for the admission of the circumstances offered to be proved would not countervail the other facts in the case, and if all were taken together there is enough to support the judgment of the court below. As to the settlement of the special case, and the suggestion that part was struck out, the third section makes the determination of the judge who settles it, final and conclusive ; and the

(*a*) 1 & 2 W. 4. c. 56.

(*b*) *Post*, Appendix, p. 568, 569.

power reserved to the Chancellor to hear appeals otherwise is not intended to meet such an emergency as the present. It was only to allow one course of proceeding instead of another, if he thought fit. In *ex parte Keys* it came before the Lord Chancellor in that way, namely, that Lord *Brougham* had been applied to, to make an order for hearing it otherwise than by a special case; and Lord *Brougham* made an order for so hearing it. When the case came before Lord *Brougham*, an objection was taken that he had no jurisdiction to hear it except on special case, because questions of fact were raised; and Lord *Brougham* said, "Then you should have applied to discharge my order, and I cannot now entertain that question, seeing there is an order not discharged." It is hardly our case to press that point particularly, because the case would stand for us, perhaps, rather better the other way. But, however that may be, what Lord *Brougham* says is this:—Lord *Brougham* has entertained the jurisdiction now, because he had made an order which was not sought to be discharged; but his Lordship says, "It is clear that the words of the act exclude appeals on matters of fact, and only allow an appeal on a matter of law or equity, or on the admission or refusal of evidence. There may also be an appeal on matters of practice, which latter is not named in the act, nor was that necessary, it being of course under the principle of jurisdiction. I am inclined to consider that the Court of Review has made an order at variance with the previous orders of the Vice Chancellor and of this Court." (a) Lord *Brougham* does not say, "I exercise my original jurisdiction, and reverse the order of the Court of Review, because the Court had no power to make the order." But he says,

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(a) 1 *Mont. & Ayr.* 240.

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“ Under the act the great seal has reserved all power of annulling fiats in bankruptcy; consequently the Chancellor has full and ample power, without any qualification, of annulling a fiat, or of refusing so to do. The great seal is not restrained as to annulling fiats by any of the provisions of the 1 & 2 Will. 4. c. 56. The Court of Review has, in fact, no power of itself to supersede; it indeed makes an order to that effect, but the great seal issues the supersedeas. The great seal issues the fiat, and the great seal supersedes the fiat, and therefore cannot be controlled in this matter by the section as to appeals. The Court of Review appears to me to have no power to supersede under the act. The power of annulling fiats is not taken away from the great seal, and with issuing fiats the Court of Review has nothing to do. The section does not convey away the power the great seal possessed, but gives a new mode of exercising it, and says, annulling a fiat shall have all the effect of the old supersedeas, and it leaves every thing else just where it was; it leaves the great seal a substantive control in cases of supersedeas.” (a) Lord *Brougham* acted in this throughout as a case in which he was acting as in the case of an appeal; and Lord *Brougham* most clearly says, that if the Court of Review makes an order for supersedeas, that, in point of fact, is the order of this Court, because the act of this Court is necessary to give effect to it; not denying the power of the Court of Review to supersede; and then he says, annulling and superseding now mean the same thing. The Court of Review makes an order for a supersedeas, but that is ineffectual till the great seal is put to it. The Court of Review does that, according to his Lordship's view, consistently with practice throughout; but, at all events,

(a) 1 *M & A*. 242.

that case can be no adjudication upon the want of jurisdiction, because there the case was heard upon the order of his Lordship affirming the jurisdiction, by directing the case to come before him in the shape of an appeal. Whether the Court has jurisdiction or not, how is it to be stated otherwise? Still it is the order of the Court of Review, to which effect is given by means of the great seal. There is another case of *ex parte Turner*. (a) The concluding marginal note is this: "The objection, that the Court of Review had no jurisdiction, cannot be taken on appeal, if not taken below." If that Court never was called upon to exercise its judgment on the question, whether that jurisdiction which it had assumed ever since it has existed as a Court of Review was a jurisdiction which it had power to exercise or not, that case would decide it. The Lord Chancellor says, "The objection of want of jurisdiction, not having been taken below, cannot now be urged. This must be dismissed, with costs. I have taken down the learned and able argument of Mr. *Montagu* on the point of law; but I find this case another illustration of a common law maxim, that an ounce of fact is worth a pound of law." In the matter of *Maberly ex parte Bretten*, and the matter of *Butterworth* (b), the proposition is affirmed that this Court has no jurisdiction to act (c) in a case where facts are to be investigated, except on a special case. There are four sections of this act which are material. They are the 3d (d), the 17th (d), the 31st (e), and the 32d. (f) The 31st is only material as being taken in connexion with the 32d, and in explanation of it. Now the 3d (d), as your Lordship knows, is, "That all such matters to be heard and determined in the said Court of

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(a) 1 *Mont. & Ayr.* 357.(d) *Ante*, p. 504.(b) 2 *Mont. & Ayr.* 686—688.(e) *Post*, Appendix, p. 568.

(c) 1 & 2 W. 4. c. 56.

(f) *Post*, Appendix, p. 569.

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Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as herein-after provided, subject to an appeal to the Lord Chancellor upon matters of law and equity, or on the refusal or admission of evidence only." Your Lordship, therefore, has no appellate jurisdiction, except "*upon matters of law and equity, or on the refusal or admission of evidence only* ; and in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct." Can ingenuity pervert the meaning of those words to mean, that they extend to appellate jurisdiction? The appellate jurisdiction is confined to matters of law and equity, or the refusal to admit evidence, and the Lord Chancellor is to hear upon special case, unless he otherwise directs; but still the appellate jurisdiction is confined to the case of matter of law or equity, or the refusal or admission of evidence, and there is no other appellate jurisdiction whatever. Now, if the clause had stopped there, there would have been very great difficulty in the Court saying what the intention of the legislature was, in cases wherein, to raise questions of law or equity, facts were to be stated; and all as to the case of refusal to receive evidence and facts necessary to raise the questions of law or equity might have been excluded. Therefore that goes on to say, " which special case shall be approved and certified by one of the judges of the said Court of Review in matters arising in the said court, and by the judge trying the issue in matters arising out of the trial of issues; and the determination of such judge on the settlement of such case shall be final and conclusive." What, therefore, the legislature has said is, these matters of law and equity are primarily the only ground of juris-

diction; and, confining ourselves for a moment to those two cases, the Court of Review, having received all the evidence which it ought to receive, is to settle a case which shall contain the facts necessary to raise the questions of law or equity. Suppose the Court of Review should refuse to receive evidence proving a material fact, that may be appealed from also; so that evidence may be received which is necessary to bring every fact under the view of the Court of Review. When that is done, the jurisdiction of that Court is final, for the purpose of determining what facts shall be stated to raise the questions of law or equity, and the Court can only hear an appeal upon those two questions.

The 17th section (a) is material, not only as it incidentally assumes the jurisdiction of the Court of Review to try questions of supersedeas, but because it confirms also the intention of the legislature as to the third section, namely, that this Court never shall be troubled with drawing conclusions from evidence; the Court of Review was to draw the conclusions, and state the case; and, whether it be a just or an unjust law, it must have been foreseen by the legislature it would be left to that court to draw from conflicting affidavits its own conclusion as to what the facts were; and this Court was only to hear questions of appeal upon law and equity, it being assumed that the evidence was all let in. Then, after stating what shall be done about the adjudication, that adjudication is made conclusive evidence of the party being a bankrupt, with a proviso, "that an appeal shall be to the Lord Chancellor from the decisions of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only;" showing clearly that all your Lordship ever had an appellate jurisdiction

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(a) *Ante*, p. 516.

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to decide was, whether evidence should be received to get the facts before the Court, and then to decide the questions of law, and that only.

The 31st and 32d sections (a) confirm the same view of the case; and the 32d section (a) still confines the appellate jurisdiction of the Court to cases of law or equity, points to be raised by a case to be stated by the Court of Review, under no other restriction than this, that it shall be bound to receive—and an appeal shall lie from the court if it does not receive—evidence which ought to be received with a view to determine that question. Supposing that were not the case, the whole of this act is destroyed, so far as the appellate jurisdiction goes; because your Lordship never could be in a condition to decide whether the case with regard to the facts was or was not to be brought before this Court, on the ground of the parties being dissatisfied with the way in which the judges of the Court of Review certified the case, without hearing the whole. Suppose the parties come to your Lordship the moment the decree is pronounced, before the special case is stated; your Lordship would say directly “Go back to the Court of Review, and get the case stated there; but if you have not been there to get the special case stated, *non constat* that the Court may not settle the case in a way fit to be decided upon.” They must therefore under this act always go, unless this sort of case exists, which may very often exist; namely, a case in which they may come to the Court and say a petition was presented by one party, the respondent did not question a single fact in it, and admitted the whole, and a question of law arose upon it; then the parties might say to your Lordship, “This is a case involving great expense; do not put the parties to the expense of having the case stated, when we admit every

fact in the petition to be true"; and so in many other cases, where, the Court having no question of fact to decide, the parties would come and say the special case will not advance the purposes of justice. Where the facts are to be stated the Court of Review has exclusive jurisdiction to state the facts. Suppose the parties go to the Court of Review. In this case the judge indisputably did settle the special case, because he, after being furnished with a case stated by the parties, stated and settled a case himself from that, and afterwards altered it to meet to some extent the view of the parties. There was the case then; and the act says that shall be final, and it was held to be final. Therefore what they come to your Lordship to say is, that whereas the case is stated, and the act makes it final, still they ask your Lordship to go into all the evidence, to hear whether that is properly stated or not; that is, whether the Court of Review, having received all the evidence that they were bound to receive, has properly drawn its own conclusions from it. If the parties have power to bring that sort of question before your Lordship, I ask what has your Lordship to do? If you have jurisdiction under the act, you cannot refuse to hear them until you hear the merits, or something of the merits. How much are you to hear? You must hear every word of the merits. Your Lordship would be just in the position that Lord *Eldon* used to say this Court was in where a party applies to the Court to suspend the execution of a decree pending an appeal. Lord *Eldon* said, "How can I know whether that is right or not if the case depends upon the merits; how can I do more than hear the merits, and decide the point?" In one or two cases Lord *Eldon* said, "As there appears to be something special, I will at once hear it, with a view to decide the question." But what your Lordship is obliged to do is this: that if the

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parties have a right to ask you to hear it at all, then they have a right to ask you to hear something of the merits; and if they have a right to ask you to hear something of the merits, then they have a right to ask you to hear all the merits: in point of fact your Lordship would not decide it upon any thing but a hearing of the whole of the merits. It follows, therefore, if the parties have a right to come at all to settle the questions of fact, they have a right to bring under your view, in every case, compulsorily, every affidavit and every particle of the evidence which the court below required, in order to state the special case. So that, whether a case shall be heard upon special case or not may rest in this way; that your Lordship, having heard the case argued, may ultimately say, "I think the Court of Review was right, and therefore I send you away" or "I do not think the variance is sufficiently material to induce me to alter the case." But your Lordship must have heard the case on its merits; and having heard it, if you are dissatisfied, what are you to do? Either dismiss it, because the jurisdiction was exclusive, or you must then frame a special case yourself, and then decide what in fact the rights of the parties were. Because it will be the same thing: you will have to review the whole facts of the case. So that, in order to determine whether the case has been properly settled, which the act says shall be "final and conclusive," you must hear the whole merits argued, before you determine whether you shall or not hear the case on petition, instead of hearing it on a special case. In point of fact, all that the act meant to do and has done, is gone, if the parties have that right; and the parties have the right if your Lordship has jurisdiction at all in the case. So the case therefore stands. If the other side admit they want a single fact to be brought under your view in order to try the present question, your Lord-

ship has no jurisdiction, for the act makes the settlement of the special case final. If, on the other hand, they say they do not want the merits at all,—that all they want is for your Lordship to exercise your jurisdiction of superseding this order of the Court of Review,—reversing, not on the ground of merits, but on the ground that, even if we had all the merits with us, the Court of Review had no jurisdiction to make the order,—then we are thrown back to argue the case upon the question, “What power has the Court of Review?” The Court of Review, from the beginning, has assumed and exercised the power; Lord *Brougham* considered that the Court of Review had that power; they have all along exercised it; and if there was nothing else in the case, these parties below never objected to the jurisdiction of the Court, but have sought throughout to bring before your Lordship a case which was to be argued and decided upon its merits.

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Mr. *Swanston* in reply:—My Lord, it would not appear, with great submission, that we are involved in the necessity of putting it as my learned friends have put it; that the Court of Review had or had not jurisdiction in this case. It is perfectly clear, on the act of parliament, that the Court of Review has not jurisdiction. But the case we come with is this: that there is an order of your Lordship’s which now stands in our way; and we ask to be heard upon the merits before that order shall remain in our way. Now, therefore, we are not dealing with an appeal; we are not coming here by way of appeal.—[The Lord CHANCELLOR:—Does not that necessarily divide itself into those two questions? That order has proceeded on the credit given to the order of the Court of Review. If the Court of Review are mere strangers, having no jurisdiction at all, it may

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be very wrong that that order should stand. On the other hand, if the Court of Review have jurisdiction, then asking me to discharge that order upon the merits is (call it what you please) an appeal.]—This question has very much embarrassed the profession from the time when it arose. I know opinions were given, immediately after the act passed, that the Court of Review had no jurisdiction. Those extensive words in the section, to which my learned friends have adverted, received in the case of *ex parte Low* (a) a construction which could not afterwards be maintained. It was plainly his Lordship's impression at that time that the whole jurisdiction was taken away from the Lord Chancellor: he said so distinctly; and that after the issuing of the fiat nothing remained for the Lord Chancellor to do in bankruptcy, except as a court of appeal, under the limitations prescribed in the statute. That could not be abided by, and accordingly it was rectified to a certain extent in *ex parte Langston* (a), and *ex parte Benson*. (a) They are distinctly at variance with *ex parte Low*. It is very true, that this particular question did not arise there; therefore I am at a loss to understand the way my friends state it. They rather come in aid of our argument to show that a limit must be put on the terms of the third section. My learned friends on the other side argued on those terms precisely as Lord *Brougham* originally construed them; their argument is exactly that which is to be found in the first judgment of Lord *Brougham*; but it has been settled again and again that that is an erroneous construction. Lord *Brougham* himself rectified it. Their argument, instead of being fortified by these cases is distinctly corrected and overthrown by them. The other side sug-

(a) 1 *Dea. & Ch.* 324.

gested that this petition might be a proceeding under the 17th section (a); but if it were so, the argument would be very much touched. But will they go to this extent, that if the petition had been presented beyond the two months there would have been jurisdiction in some court to entertain jurisdiction? If so, it is not a petition under the 17th section. (a) In fact it does not pray that peculiar relief which the 17th section (a) is framed to afford, which is the creature of that section, and was never heard of before that statute passed. It is very true that the word "reversal" finds its way into the petition; it prays that the fiat may be reversed and annulled. Suppose that petition had been presented at the end of two months; would that have enabled the respondents upon demurrer to have contended that it was absolute as against the bankrupt? Unless that argument is maintained, *cadet questio*.—[The LORD CHANCELLOR:—The Court of Review have decided, as I understand, that the effect of that section was only to give the bankrupt the right, if he presented a petition within a limited time, to have an issue as matter of right, not interfering with the general jurisdiction of the Court, if he should not take that course.]—Certainly; and that after the two months it is competent to the bankrupt to present a petition to annul. By some arrangement that jurisdiction has been assumed by the Court of Review to hear those petitions; but a proceeding, which strikes one as rather singular, has been the result, that as it was clearly not within the jurisdiction of that Court to annul the fiat, the fiat has been annulled by a proceeding which one does not distinctly understand. It cannot be as the other side put it; for they contend, that this order of the 29th of November

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(a) *Ante*, p. 516.

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may be sustained as your Lordship's order pronounced on the 19th section. With great submission, I ask your Lordship's judgment upon that point. How can it be maintained as a judgment pronounced upon that 19th section (a)? That must be an order upon which the judicial functions have been exercised. A hearing, however solemn, or whatever time it occupied in the court below, is, with great deference, no foundation for an order in the court above. That seems to me something like delegation of judicial functions. It is judging by proxy. It is impossible that that argument can be entitled to any weight. Unless that argument can be maintained, on what finding can my friends attempt to rest this order? They have not suggested one. They put it on the 17th section (b); they say it is a proceeding upon that section. I have answered that. Then they say it is on the 19th section. (a) With great submission, the answer to that is still more clear. Upon what section then is the order? It is an order made by that anomalous course of proceeding which has taken place, but which, we apprehend, cannot stand upon any established principle whatever. Contrast the provisions in the 17th section (b) with the other provisions,—the 12th section (c), relative to issuing a fiat, and the 18th (d) and the 19th (a) sections. Under the 12th (c) section the power is unquestionably given to the Lord Chancellor to issue the fiat, and to him only. Now, under the 19th section (a) the power is given to the Lord Chancellor to annul a fiat; and how any one else can pretend to have such power I am at a loss to understand. But if there were any doubt upon this, I refer to the provisions of the 17th section. (b) If it was

(a) *Ante*, p. 518.

(b) *Ante*, p. 516.

(c) *Ante*, p. 515.

(d) *Post*, Appendix, p. 568.

implied by the 19th section (a) that the Court of Review should have the power to annul the fiat, it seems to me a supposition almost too extravagant to be entertained merely as a supposition; still, when you contrast the 17th section (b), which gives power to the Court of Review, with the other three sections which give power to the Lord Chancellor, no doubt can remain with regard to the court which really has the jurisdiction in question; because, in the 17th section (b), which entitled the bankrupt to this proceeding, it is expressly directed that that shall take place in the Court of Review. The Court of Review can hear the petition; and what is to be done with the order of the Court of Review that may become the subject of appeal to the Lord Chancellor? How can it be dealt with by the Lord Chancellor as an appeal? There is a substantial order of a Court, having substantial and independent jurisdiction, and which this statute then proceeds to make the foundation of some order which is to emanate from the Lord Chancellor.

The 18th section (c), as connected with the 17th section (b), appears to be most material, as pointing out that all the authority which the legislature intended to give over that question was given by the 17th section (b), in the form of a question on the reversal of adjudication, followed by the order of the Lord Chancellor to annul the fiat. The effect of that, under the 17th section (b), if it stood alone, would be, that that proceeding was final,—the reversal of the adjudication was final and conclusive evidence that the party was not a bankrupt at the time of such adjudication. So that if that stood, no matter how many acts of bankruptcy a man had committed, still the reversal of the adjudication standing, it was conclusive evidence that he was up to that time

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(a) *Ante*, p. 518.

(b) *Ante*, p. 516.

(c) *Post*, Appendix, p. 568.

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not a bankrupt; and in fact no bankruptcy could be issued against him upon any anterior act. Now the 18th section (*a*) qualifies that very strong operation of the reversal of the adjudication under the 17th section. (*b*) But how is it qualified? The Court of Review cannot qualify it. The Lord Chancellor is empowered to issue his reversal of adjudication; the Lord Chancellor is empowered, within a certain limited time, and on special circumstances, which are to be submitted, not to the Court of Review, but to the Lord Chancellor, to order that another fiat shall issue at the instance of any other than the former petitioning creditor. So that the legislature has thus provided for the extraordinary case of the reversal of an adjudication against an individual who was palpably a bankrupt, and who, but for this provision, would have defied his creditors, because it would have been impossible to have obtained a fiat against him. The distinction seems so plainly drawn there between the two jurisdictions;—between the power of the Lord Chancellor and of the Court of Review; the latter being expressly confined to the reversal of the adjudication, as not a dealing with the fiat, but a ground for dealing with it, and an impediment to a fiat. When a fiat is to be dealt with, resort is immediately had to the Lord Chancellor; and it is this Court which is empowered, by issuing the fiat under the circumstances which, to a certain extent, are covered by the 17th section, to modify the operation of that 17th section.

The LORD CHANCELLOR:—It is not confined to adjudications reversed under the 17th section. (*b*)

Mr. *Swanston* :—"After any such issue shall have been tried as aforesaid."

(*a*) *Post*, Appendix, p. 568.

(*b*) *Ante*, p. 516.

The LORD CHANCELLOR :— The 19th section (a) is,
 “ it shall be lawful for the Lord Chancellor.”

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Mr. *Swanston* :— The 19th section (a) is not at all confined : the 18th (b) is ; and it moderates the operation of the 17th. The reversal of the adjudication is the business of the Court of Review ; but that Court is not permitted to deal with the fiat ; but the moment the fiat is to be dealt with resort is had to the Lord Chancellor. As to the 19th section (a), that is not a limited section. There again the four sections,—the 12th, the 17th, the 18th, and the 19th,—all harmonize in this way, that an exclusive jurisdiction over the fiat is given to the Lord Chancellor ; whereas a jurisdiction to reverse an adjudication,—a novelty originating in this act,—is given to the Court of Review, which may undoubtedly be a foundation for reversing the fiat. My Lord, whatever inconveniences may have been experienced or may now exist between the two jurisdictions is not a question which could affect the rights of the suitors. Any arguments of inconvenience, whatever they may be, and upon whichever side they may prevail, will not affect the construction of the statute.

The LORD CHANCELLOR :—Just explain an observation which has been made, which struck me as deserving an answer. How this can be original ;—what it is that you ask which you could ask if this Court exercised an original jurisdiction. It is not to rescind the order that you ask the writ of *procedendo*. That is founded upon its having been stopped in the proceeding elsewhere.

Mr. *Swanston* :—The order that we seek to rescind we consider as an order which has no other foundation than the original jurisdiction of this Court.

(a) *Ante*, p. 518.

(b) *Post*, Appendix, p. 568.

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The LORD CHANCELLOR :—Then that comes round to the question of the Court of Review having no jurisdiction at all. I put it to you whether you can get out of that argument. If you are right in that, you are right in the whole; but if you are not right in that, is there any other ground?—I mean otherwise than treating it as an appeal. If there were concurrent jurisdictions, after one court has exercised that jurisdiction another court having concurrent jurisdiction cannot treat that as a nullity.

Mr. *Swanston* :—We thought that it might be viewed in this way: the order that impedes us is your Lordship's order; we do not come upon appeal from that; we are in your Lordship's Court, and if we discharged that order, it would, we apprehend, be in the exercise of original jurisdiction.

The LORD CHANCELLOR :—You are in this difficulty: the act says, it is on the reversal of the adjudication, or such other case as the Lord Chancellor thinks fit. In the way in which it stands, I have seen fit, giving credit to the judgment of the Court of Review, to act upon it, and annul the fiat. If that Court has no jurisdiction, you take away the foundation of the order; but if the Court has jurisdiction, how do you show that there was not sufficient ground for my superseding the fiat, without going into the merits of the case before the Court of Review.

Mr. *Swanston* :—We should apprehend we might bring the merits of the case before your Lordship.

The LORD CHANCELLOR :—How otherwise than upon appeal? Nobody can deny, then, that if the Court of Review has jurisdiction, it is not an unreasonable exercise of my jurisdiction to give credit to the order of the Court of Review having competent jurisdiction. If that be so, how can you show that it has not been properly

exercised, without showing that the Court of Review have come to an erroneous conclusion? and then it is an appeal at once.

Mr. Swanston :—We do not deal with the order of the Court of Review.

The LORD CHANCELLOR :—If the Court has jurisdiction, can you say it is not a reasonable exercise of the authority which I have, to give credit to the judgment of a Court having competent jurisdiction.

Mr. Swanston :—At least we should say, that your Lordship, not hearing the parties before your order was made, would hear them upon an application to discharge it. That is the way we put it.

The LORD CHANCELLOR :—Is not that an appeal in another shape?

Mr. Swanston :—It may be, but, with great submission, it is not technically an appeal. Your Lordship is not exercising appellate jurisdiction. If you were, it would not serve our purpose.

The LORD CHANCELLOR :—It does not serve your purpose. The question is, whether the act has not expressly excluded you from doing what you are attempting to do.

Mr. Swanston :—We have not been heard upon the order. We were heard in the Court below.

The LORD CHANCELLOR :—Nor is a party, who is ordered to be committed by the Master of the Rolls, heard upon my order.

Mr. Swanston :—That is true; but I certainly thought it was competent to that party to apply to this Court to discharge its order.

The LORD CHANCELLOR :—That is the regular way of appealing against an order of the Master of the Rolls. That is an appeal. There is no doubt about that.

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Mr. *Swanston* :—No doubt it is ; but, if the order to be discharged was your Lordship's order, no proceeding of ours to discharge it would be an appeal. If the order complained of is the order of the Court below, then, undoubtedly, coming here to discharge it is an appeal. That is not what we do. We deal with your Lordship's order ; that is, an order which has been made by your Lordship without our being heard : the form of the proceeding did not admit of it. What we ask is this, that before the order of this Court stands against us we may be heard upon the question whether that is or not a right order.

The LORD CHANCELLOR :—That would come to this, that, assuming the Court of Review has jurisdiction, I am never to act upon it without hearing the matter over again.

Mr. *Swanston* :—It does certainly appear to me a very great difficulty how the order is to stand of one court made merely on the faith which is given to the order of another.

The LORD CHANCELLOR :—It is according to the practice in various instances. I am bound to issue a writ on the authority of a judgment passed by the Ecclesiastical Court.

Mr. *Swanston* :—It will be in your Lordship's recollection, that in a case before Lord *Eldon* (a), where a question arose on a decree of the Master of the Rolls, whether there could be a rehearing before the Lord Chancellor where there had been a rehearing below, and it was suggested that one expedient might be, that an order should be made *pro formâ*, Lord *Eldon* declined that, and said he thought no order ought to be made except upon deliberate hearing, in the exercise of his own judgment ; not interfering with the course of practice which

(a) *Brown v. Higgs*, 8 Ves. 567.

your Lordship has alluded to, which, as I understand, are cases where the great seal gives effect to an order made by a court of competent jurisdiction; and they may be analogous to this case, if I were put to argue it upon the admission that the Court below had jurisdiction. I feel that; but they are orders of a different nature. Your Lordship's order is precisely that which you would have made supposing the question had been before you, and the other side had satisfied you they were entitled to that order; it is exactly the order which would have been made upon the regular hearing of the case. Now, we humbly apprehend, coming to your Lordship to discharge that order, we are not proceeding either strictly or virtually by appeal, but that we are applying to that original jurisdiction from which the order emanated.

The LORD CHANCELLOR:—I must look into the cases which have been referred to before I dispose of it.

Judgment postponed.

The LORD CHANCELLOR:—

In this case a fiat in bankruptcy having been issued against Mr. *Hall*, he presented a petition to the Court of Review, praying that the fiat might be annulled, with costs, and the bond assigned. The Court of Review ordered the fiat to be annulled, and the costs paid to the petitioner by the petitioning creditor, upon which an order issued annulling the fiat. Against this order the petitioning creditor presented a petition to me, praying that my order might be discharged, and that a writ of *procedendo* might issue, directing the commissioners to proceed, notwithstanding the order of the Court of Review; and that the costs of the petitioning creditor of *Hall's* petition, which the Court of Review had ordered him to pay, and the costs of the petition, might be paid

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out of the bankrupt's estate. The petition addressed to me contains a statement of the case as it is represented to have existed before the Court of Review, and states that two of the judges of that court thought the fiat was valid in law, but that one of them thought there were equitable grounds for annulling it, in which latter opinion the third judge concurred with him, but also thought it was not valid in law; and the petition states, as a reason for not proceeding by way of special case, that the learned judge declined to introduce into the special case some of the facts stated to have been in evidence before the Court of Review. So far as the petition to the Court of Review objected to the adjudication upon the ground of a legal objection, the case is precisely within the 17th section (a) of the 1 & 2 Will. 4. c. 56., as to which an appeal is given to the Lord Chancellor upon matters of law and equity, or as to the refusal or admission of evidence only; which appeal, by the 3d section (b), is as to all cases confined in the same manner to be by special case, unless the Lord Chancellor shall otherwise direct. So far as the petition to the Court of Review sought to have the fiat annulled upon equitable grounds, the case necessarily depended on facts; but of facts the act constitutes the Court of Review the sole judge, the 3d section (b) directing that the appeal to the Lord Chancellor shall be on matters of law and equity, or the refusal or admission of evidence only; and the determination of the judge in the settlement of the case is, by the same section, declared to be final and conclusive. What I am asked to do by this petition is, to reverse by way of appeal the judgment of the Court below, as to the adjudication within the 17th section (a), or as to the determination of the judge

(a) *Ante*, p. 516.

(b) *Ante*, p. 504.

in the settlement of the case, which the 3d section (*a*) declares shall be final and conclusive, and this upon a question of fact, which, by the 3d section, I am prohibited from entertaining. These provisions of the act would be conclusive against my jurisdiction, not because the proceeding is by petition, (for as to that some discretion is reserved,) but because it is an appeal upon matters of fact, and against the determination of the judge in the settlement of the case.

But it is argued that the case in question is an exception to the general rule, inasmuch as it concerns the fiat, over which it is argued that the act has reserved exclusive jurisdiction to the great seal. It is to be observed that this is not an application to exercise original jurisdiction, but an appeal from the decision of the Court below, and I find no exception made as to the power of the Court of Review in the 2d section (*b*), or as to the restriction upon appeal in the 3d section (*a*) in favour of questions respecting the fiat; and, on the contrary, the 17th section (*c*), in a matter of equity affecting the fiat, not only assumes that the Court of Review has jurisdiction, but regulates the proceedings of that court in such matters, and the mode of appealing from its decision. It is true that the 12th section (*d*) gives to the Lord Chancellor, or those whom he may appoint, the authority to issue the fiat in the first instance; and the 18th section (*e*) gives him power in certain cases to issue a second fiat, and the 19th section authorizes him in certain cases to rescind or annul the fiat. These cases are, first, the reversal of any adjudication in bankruptcy, which by the 17th section (*c*) it is clear the Court of Review has the power to reverse; and so far it is clear that this act of rescinding or

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(*a*) *Ante*, p. 504.
(*d*) *Ante*, p. 515.

(*b*) *Ante*, p. 514.

(*c*) *Ante*, p. 516.

(*e*) *Post*, Appendix, p. 568.

1889. annulling, though reserved to the great seal, must be founded on the judgments of the Court of Review. But
— this section also authorizes the Lord Chancellor to
Ex parte rescind or annul the fiat for such other causes as he
STUBBS. shall see fit; and those provisions it is contended give
In the matter the Lord Chancellor jurisdiction in all cases which con-
of cern the rescinding or annulling the fiat. But this
HALL. section must be considered with reference to other provisions of the act. It is well known that petitions for superseding commissions constitute a large portion of the business in bankruptcy, and it cannot be supposed that the act intended to reserve to the Lord Chancellor jurisdiction over all such questions; particularly as we find that the 17th section (a), in terms, contemplates and regulates the mode of proceeding in the Court of Review, and appealing to the Lord Chancellor in such matters. It was probably thought inconsistent with the dignity of the great seal that the Court of Review should have the power to annul a fiat which had issued under the authority of the great seal, and that therefore the very act of annulling was reserved to the Lord Chancellor; but it cannot be supposed that it was intended to withhold from the Court of Review the power over all the preliminary proceedings, when the power of reversing the adjudication is expressly given to them. I do not feel it necessary to pursue these questions of original jurisdiction further, because I have before me a case of appellate jurisdiction only, as to which I am prohibited from interfering with the judgment of the Court of Review, except on matters of law and equity, and the refusal or admission of evidence, or with the determination of the judge in the Court of Review in the settlement of the case, upon which special case I am directed

(a) *Ante*, p. 516.

to hear appeals, and in no other mode whatsoever, unless I otherwise direct. Now this discretion, and this direction which I am so authorized to give, relate only to the means of bringing the case before me, and cannot be considered as intended to extend my jurisdiction to matters of appeal. I think the matter attempted to be brought before me, namely, the manner of settling the case, is not that which can be matter of appeal; and that I should be departing from the spirit and meaning of the act if I were to dispense with the directions of the act as to proceeding by appeal in special cases only.

The decision in *ex parte Keys*, 1 *Mont. & Ayr*. 226, is not inconsistent with this construction of the act, because the act gave the great seal the power, if it saw fit, of hearing matters of appeal from the Court of Review otherwise than by special case. If the observations of Lord *Brougham* in page 242 are to be understood as expressing an opinion that the jurisdiction of the great seal is on all matters relating to annulling the fiat untouched by the provisions of the act, even in cases which have been before the Court of Review, and which, therefore, come to the great seal by way of appeal, I am not prepared to concur in that construction of the act. I do not find any such exception made of the general proposition laid down in *ex parte Langston*, *Mont. & Bligh*, 142. It would not be expedient to attempt to lay down rules as to what circumstances ought to induce the great seal to hear appeals from the Court of Review otherwise than by special case. It is obvious that if applications for that purpose were readily assented to the mischiefs intended to be remedied by the act would be speedily restored. It by no means follows, when such permission is given, that the expression of the act, "that the great seal shall hear appeals only on matters of law and equity, and the refusal or admission of evidence," are to be con-

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 expressing any opinion as to what might be the course
 to be adopted if I were to hear this appeal otherwise
 than by special case, I am of opinion that sufficient
 ground is not laid for my exercising a discretion given
 to me by the act, and that I have therefore no juris-
 diction over what has taken place in the Court of
 Review, unless an appeal should be brought regularly
 before me on a special case. The petition, therefore,
 must be dismissed, with costs.

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Petition dismissed.

APPENDIX TO EX PARTE STUBBS.

“ Provided always, and be it further enacted, That after any such issue shall have been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances, to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy other than those given in evidence on the trial of such issue.”—1 & 2 Will. 4. c. 56. s. 18.

“ And be it enacted, That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under the review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend or dividends on the debt in dispute in such proof may be set apart in the hands of the said accountant general until such decision be made; and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor.”—1 & 2 Will. 4. c. 56. s. 31.

“ And be it enacted, That if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and in case of such an appeal the determination of the Lord Chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then and in that case the proof of the debt shall be again heard by the Commissioner or Subdivision Court, and the said evidence shall be then admitted or rejected accordingly.”—
1 & 2 Will. 4. c. 56. s. 32.

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Appendix.

Ex parte HILLARY JOHN BAUERMAN and
FRANCIS CHRISTIE.—In the matter of JOHN
LOMAX.

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THIS petition prayed that the Northern and Central Bank might be declared not entitled to a dividend; and that a dividend might be declared; and, if necessary, that the proof by the Northern and Central Bank might be expunged; and for a new choice of assignees.

Hamer, Dakin, the above bankrupt *Lomax, Magee*, and *Dean* were severally creditors of *Thomas Hughes*. By indenture, 12th and 13th May 1834, *Hughes* assigned to them all his property, for the purpose of carrying on his business for the benefit of creditors. About the 27th May 1834 *Hamer* and the others opened a banking account with the Northern and Central Bank. On the 4th September following, *Hughes* was declared bankrupt, and *Hamer, Dakin, Lomax*, and *Magee* (a) were chosen assignees, they having carried on the busi-

Creditors having brought a joint action against the bankrupt and *A. and B.*, and having procured bankrupt to plead bankruptcy, undertaking to release and discharge him, and having entered a *nolle prosequi* as to him, and obtained judgment by default against *A.*, and verdict and judgment against *B.* :
Quære, Whether the right against bankrupt's estate is not merged and gone *in toto*?

(a) It did not appear what became of *Dean*.

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ness up till that time, and they became largely indebted to the Northern and Central Bank in respect of the said business. In April 1835, on the petition of *Mendel* and others (a), a new choice of assignees was directed; but *Hamer* and his co-trustees and assignees were at liberty to continue carrying on the business. About the 28th April 1835, *Dakin* ceased to have any thing more to do with the business, having also transferred to *Lomax* all his interest in the debts due to him by *Hughes* and the trustees; and, with the full knowledge of these facts by the Northern and Central Bank, the business was thenceforth carried on by *Hamer*, *Lomax*, and *Magee*.

Under the order of April 1835 *Richard Powdrell Hobson* was chosen assignee, in the place of the above assignees. *Hamer* died 16th July 1836, leaving considerable property, having made a will, and appointed executors, who, in August 1836, conveyed all their interest in *Hughes's* estate to *Lomax*, who indemnified them against all liabilities in respect of carrying on the trade of *Hughes*. The Northern and Central Bank were also made acquainted with this arrangement.

Lomax and *Magee* then continued the business, still banking with the Northern and Central Bank; but at last, with like knowledge on the part of the Bank, it became vested in *Lomax* by assignment, who carried it on until his bankruptcy.

On the 21st February 1837 *Dakin* became bankrupt, and the Northern and Central Bank proved against his estate for 3,970*L.*, as owing by *Dakin* jointly with *Hamer* and the others, and by such proof they were enabled to choose *E. Connell* sole assignee of the estate.

On the 11th April 1837 the fiat against this bankrupt, *Lomax*, issued, and the Northern and Central

(a) See the case, 4 *Dea. & Chitty*, 725.

Bank proved the above debt, with some small deduction, and in consequence procured *E. Connell* and *G. Hall* to be appointed assignees, who seized the property of *Hughes* undisposed of. The petitioners and other creditors of *Lomax* proposed *Samuel Oliver* to be the assignee, but they were out-voted by the Northern and Central Bank.

In April 1837, after the issuing of the fiat against *Dakin* and *Lomax*, the Northern and Central Bank filed a bill in the Exchequer against the executors of *Hamer*, for an account of and due application of his assets towards payment of the above-mentioned joint debt due from *Hamer*, *Dakin*, *Lomax*, and *Magee*, which suit was still pending. *Hamer's* estate was alleged to be solvent. They also, after the proof against *Dakin's* estate, commenced an action against *Dakin*, *Magee*, and *Lomax*, for recovery of the same debt, in which action a declaration was filed on the 19th June 1837. *Lomax* applied for stay of proceedings against him, on the ground of proof being made against his estate, which was ordered; but in March 1838 the solicitor of the bank applied to the solicitors of *Lomax* to abandon the order, and plead to the action, and agreed that on such being done a *nolle prosequi* should be entered upon such plea, which arrangement was carried into effect; and *Lomax* pleaded his bankruptcy, and *Dakin* allowed judgment to go by default, and *Magee* pleaded *non assumpsit*, to which the plaintiffs replied, and ultimately recovered a verdict against *Magee* and *Dakin* for 4,271*l.*

In April 1838 *Magee* became bankrupt, and the bank proved the debt against his estate.

The petition stated, that *Hamer*, *Dakin*, *Lomax*, and *Magee* never were partners in any trade, except so far as they could be so considered in respect of their carrying on *Hughes's* business.

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Magee was solvent at the time of proof against *Lomax's* estate.

Mr. *Anderdon* and Mr. *Bethell* for the petitioners:—

This proof must be expunged, because the 6 Geo. 4. c. 16. s. 62. does not apply to joint contractors, or, as here, to co-trustees under a trust deed. Co-trustees or joint contractors can never come under the definition of "partners," as used in that section. Though carrying on trade, they were not partners, but the trust estate which they held was alone liable as the joint estate; *ex parte Garland*. (a) It is also requisite that to enable proof to be made, the firm should be existent, except as far as it is dissolved by the bankruptcy of the member against whose estate the proof is sought to be established; but such firm as existed here was dissolved long before *Lomax* failed, by the death of *Hamer* and the bankruptcy of *Dakin*. This principle is established by *ex parte Morris*, in the matter of *Desormeaux*. (b) Then, again, proof has been made against this separate estate, while the estate of *Hamer* is still believed to be solvent, and no dividend can be taken; but it is a well-known principle that you cannot prove a joint debt, for the purpose of taking dividends, against the separate estate, so long as there is another solvent estate applicable and available to the payment of it. [Sir *George Rose*:—You say they are not partners, but co-contractors. What authority have you to show that this principle applies to co-contractors?] The rule is of universal application to any case of administration of assets. Where one creditor has the power of resorting to two estates, and another creditor only to one, the former shall first have recourse to that which is not within reach of the second creditor, singly secured. It is so in cases of mortgage and other charges. *Gray v.*

(a) 10 Ves. 110.

(b) *Mont.* 218.

Chiswell (a); *ex parte Hartley (b)*; *Sheppard v. Kent (c)*;
ex parte Janson, re Corf. (d)

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The death of *Hamer*, so long as his estate is solvent, can make no difference. *Magee* was also solvent at the time this proof was made; and to hold that his subsequent bankruptcy relieved that difficulty would be to give a premium to laches in the creditor. It operates the other way; for if the demand had been made against him in time, the estate of *Lomax* might have been discharged.

But there is another objection fatal to this proof. The bank have waived their right against *Lomax*. They brought a joint action against *Lomax*, *Dakin*, and *Magee*; and having done so they afterwards suggested to and agreed with *Lomax*, that if he would plead his bankruptcy they would release him by the mode of working his fiat. They release and discharge *Lomax* from all liability, and enter a *nolle prosequi* as to him. The assignees go on with the action, and obtain judgment by default against *Dakin*, and recover a verdict, and obtain judgment against *Magee*. This, we contend, merged the right against *Lomax's* estate.

Creditors having brought a joint action against the bankrupt and *A.* and *B.*, and having procured bankrupt to plead bankruptcy, undertaking to release and discharge him, and having entered a *nolle prosequi* as to him, and obtained judgment by default against *A.*, and verdict and judgment against *B.* :
Quære, Whether the right against bankrupt's estate is not merged and gone *in toto* ?
Semble, that the rule as to not proving so long as a solvent partner remains does not apply in the case of joint contractors having no joint estate.

Mr. *Swanston* and Mr. *Bacon* for the assignees:—If there were at any time any thing in the objection that *Magee* was solvent at the time this proof was made, it is now inoperative by reason of his subsequent bankruptcy, and proof might be made again if expunged on that ground, as there would be no such laches as to affect

(a) 9 Ves. 118.

(b) 2 Mont. & Ayr. 496; 1 Dea. 288.

(c) Prec. Ch. 190; 2 Vern. 436.

(d) 5 Mad. 229.

A proof having been admitted while a solvent partner existed, the Court will not expunge the proof, if that partner has subsequently become insolvent, as it would be going through a mere form to expunge, when it could be re-admitted by reason of the subsequent insolvency. A partner dying, leaving a solvent estate, is not a case within the rule, that a joint creditor cannot prove in competition with separate creditors so long as there is a solvent partner liable.

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the right. It is not like the case of suretyship; *Hamer's* solvency has nothing to do with the question of proof, because he was dead before it was put upon the proceedings, consequently his assets could only be made available by means of a suit in equity. If he had been living, then indeed an action might have been resorted to, and it is on that ground that the rule contended for is founded; but by his death the right of action was gone, even as against his representatives, and could only be maintained against the surviving partners. The rule has never been adopted where recourse is to be had against the assets of a deceased partner.

Mr. *Anderdon* in reply.

Erskine, C. J.:—

The principle which it has been contended vitiates this proof does not apply in this case. If the parties had all remained solvent, and were living, the creditor might have brought his joint action against these four parties, and might have sued out execution against the property of any one. But death and bankruptcy have both intervened, and by an established rule, the principle of which it is not easy to understand, a joint creditor cannot resort to the separate estate of one bankrupt debtor so long as he has the power of so proceeding at law against any solvent partner. But in the first place, is there any partnership or joint property in this case? All that could be so considered arose out of the trust deed by which *Hughes* assigned all his property to *Hamer, Dakin, Lomax, Magee, and Dean*. That property is now vested in Mr. *Hobson*, the assignee chosen in the place of the first four, who were removed by the order of the 22d April 1835, having previously been vested in those four as assignees in bankruptcy, and for a specific purpose.

Supposing they could at any time have been considered as partners in the manner contended for by the petitioners, we find that at the time of this proof, *Dakin*, and of course *Lomax*, were bankrupts; *Magee* was solvent, and *Hamer* was dead, — solvent, as it is said. *Magee's* subsequent insolvency removes the objection, if any existed, because it would now be competent to us to place the proof immediately again on the proceedings, if we were to take it off, for the sake of form, upon the objection applicable to it at the time of the original proof. So much for the objection as to *Magee's* former solvency. *Hamer* is dead, and no action could be brought in which his name could be used, or his representatives be made parties, so as to enable the creditor to get execution against his assets. The only way in which his assets could be got at would be by bill in equity; and where such is the case the rule contended for as to the existence of a solvent partner incapacitating proof does not apply. I see no grounds for expunging this proof.

Sir John Cross:—My only doubt has been, whether or not there was a solvent partner. But I am not aware of any authority by which we could hold that a deceased partner could be regarded for this purpose as a solvent partner. I also think the parties were not partners, but co-contractors and trustees. There is no joint estate, and, in my view, no solvent partner; therefore this proof must stand.

Sir George Rose:—The test is, whether there is a right of action. Here there is none against the representatives of *Hamer*, for the creditor can only proceed against the survivors.

Petition dismissed. Costs of both parties out of the estate.

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Nov. 22
& 23,
1839.

Ex parte CHARLES MARSTON.—In the matter of
WILLIAM MARSTON.

Ex parte BROOME.—In the same matter.

Held, that the estate of a partner in a joint stock company, who has become bankrupt, and against whom judgment has not been obtained pursuant to 7 G. 4. c. 46. ss. 9. 12. & 13., is liable to the claims of a creditor of the company; bankruptcy being a statutory execution.

Whether 6 G. 4. c. 16. s. 62. applies where the partnership has ceased to exist?

Deposition of debt against a bankrupt indorser of bill, not showing notice of dishonour of bill to have been given to him: Held not defective, if commissioner be satisfied *aninde*, or if it be the fact that notice was given.

Quære, Whether any creditor can object to the informality of such deposition on a question of proof?

No difference between a banking company under 7 G. 4. c. 46. and an ordinary partnership, as regards the effect of 6 G. 4. c. 16. s. 62.; and a creditor of the company may prove against the separate estate of an individual member for the purposes of the latter section.

Bankruptcy is a statutory execution.

A banking company under 7 G. 4. c. 46., though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 G. 4. c. 16. s. 62.

Difference between co-contractors and copartners.

Evils of joint stock companies, as regards the certificates of individual members becoming bankrupt, pointed out.

THIS was a petition to expunge a proof, and for a new choice of assignees. The fiat was dated 19th August 1839, and issued upon the petition of the petitioner, and upon an act of bankruptcy on the 11th July preceding. On the 9th September following the petitioner proved a debt of 840*l.* against the separate estate, and two other debts of 1,472*l.* 1*s.* 4*d.* and 300*l.* were also proved by other parties, and two other debts since then of 32*l.* 13*s.* 10*d.* and 45*l.* 8*s.* 8*d.* were also proved against the separate estate. Besides carrying on business on his separate account, the bankrupt was member of the Imperial Bank of England, of the Northern and Central Bank, and of the North of England Bank; which companies were carried on under the provisions of the 7 Geo. 4. c. 46.; and he was also at the time of his bankruptcy one of the registered officers of the Imperial Bank. This latter bank became embarrassed, and stopped payment in April 1839, leaving many debts still unpaid.

Many actions were brought against the bankrupt in the character of registered officer by the creditors of the Imperial Bank, and judgments obtained and entered up against him subsequent to the date of the fiat.

The bankrupt had duly paid up all calls, and was not indebted to the Imperial Banking Company at his bank-

ruptcy. *John Whittenbury* attended the meeting on the 9th September, and claimed to prove for 3,047*l.* and interest as a debt due from the bankrupt jointly with the other members of the Imperial Bank upon certain bills of exchange, and amongst them for a bill of 2,500*l.*, dated 20th March 1839, alleged to have been indorsed to him by the company, for the purposes in the 6 G. 4. c. 16. s. 62., viz., of voting in the choice of assignees and assenting to or dissenting from the certificate of the bankrupt, and taking any surplus of his estate after payment of his separate creditors. On the ground that the bankrupt being a member of the company a liability was constituted on the part of the bankrupt or his estate to the proof under the 6 Geo. 4. c. 16. s. 62., for the purpose of voting in the choice of assignees, and controlling the certificate, and claiming surplus, after payment in full of the separate creditors, the proof was allowed; but was objected to by the solicitor of the petitioner, on the ground that judgment was not then obtained against the bankrupt or any other registered officer of the bank. In the return by the Imperial Bank to the Stamp Office of the 1st April 1839 the names of 163 persons, as all the parties concerned in the bank, were set forth, and amongst others the following: *James Astley, Samuel Hodson Sale, Robert George Beesley, Thomas Barker, Joseph Heaward, Joseph Lawless, Robert Leake, and John Sharrocks*, and such persons were previously to and on the 20th March (the day the bill was indorsed), and subsequently, members of the company. The Reverend *Jonathan Barker*, who died on the 16th March 1839, was a member, and his name was included in the said return. *Sale and Astley*, on the 22d July 1839—*John Sharrocks*, and his partner *William Sharrocks*, on the 8th May 1839—*Lawless*, on the 2d July 1839—*Barker*, and his partner *Ainsworth*,

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MARSTON
and
ex parte
BROOME.
In the matter
of
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Ex parte
 MARSTON
 and
ex parte
 BROOME.
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on the 8th July 1839 — *Leake*, on the 17th July — *Beesley* on the 24th July — and *Heaward* and *Beesley*, jointly, on the 27th July 1839, were severally and respectively declared bankrupts, at the instance of *Whittenbury*, in respect of his debt. The proof by *Whittenbury* turned the choice of assignees. The property of the bankrupt was stated to be adequate to pay the separate creditors in full.

The deposition on which the proof in question was founded expressed that the bankrupt was, together with certain persons whose names were set forth in the return to the Stamp Office, justly and truly indebted to deponent in 2,500*l.* upon bills of exchange set forth in the schedule, and also in the further sum of 27*l.* 1*s.* 4*d.* for interest; “which said bills were indorsed and paid to the deponent” by the bank for, &c., and which bills were not paid; for which debt he had received no security except the bill, which was duly presented for payment when at maturity, and being dishonoured was returned to deponent.

The fiat against this bankrupt was directed to *John Frederick Foster* and *Leigh Trafford*, Esquires, and *Samuel Kay*, *Aldcroft Phillips*, and *William Seddon*, Gentlemen, and *Richard Poudrell Hobson* was appointed provisional assignee. The fiat against *Sale* and *Astley*, which was prior thereto, was directed to the same list of commissioners, and *Hobson* was appointed assignee; so of the fiats against *Beesley* and against *Heaward* and *Beesley*.

Upon the question of the choice of assignees under this fiat the petitioner and other separate creditors contended that, supposing the commissioners were right in adjudicating the company to be a firm within the 6 Geo. 4. c. 16. s. 62., then the proof by *Whittenbury* was improper, and he ought not to have a voice in such

choice; and that under the 6 Geo. 4. c. 16. s. 17. the same assignee (namely *Hobson*) who was appointed in the prior bankruptcy of *Sale* and *Beesley* ought to be appointed in the present bankruptcy; but the commissioners overruled the objection, and *Richard Whittenbury* and *William Broome* were appointed assignees.

From the respondent's affidavits it appeared that *Whittenbury* commenced an action against the Imperial Bank on the 8th July, for recovery of the amount of the bills due to him, and he obtained a verdict at the Liverpool summer assizes, and obtained final judgment on the 22d October, which was not till after the proof made by him, viz. on the 9th September.

There was another, a counter petition, in the paper, *ex parte Broome*, in the same matter, for the delivery up of certain proceedings on behalf of the assignees chosen.

Mr. Swanston and *Mr. Archbold* appeared in support of the counter petition, which it was unnecessary to go into.

Mr. Anderdon and *Mr. Bacon* for the first petition:—

There are four objections we have to urge against this proof. The first question is, Whether a creditor of a company, not having, at the time of his tendering proof, a judgment against the public registered officer, can prove under a separate fiat against an individual member of the company? Secondly, Whether, under the 6 Geo. 4. c. 16. s. 62., he could prove, where, before tendering such proof, the company was dissolved by the bankruptcy or death of some of its members. Thirdly, Whether the deposition of debt by the creditor, not stating therein that notice had been given to the indorsers of the bill of the dishonour, did not vitiate it?

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MARSTON
and
ex parte
BROOME.

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And, fourthly, Whether, supposing the company to be a firm within the meaning of the 6 Geo. 4. c. 16. s. 62., and prior fiats having issued against other members, this fiat, under the 17th section, ought not to go to the same commissioners; and whether the same assignees ought not to be chosen as under such prior fiats?

On the true construction of the 7 Geo. 4. c. 46., it will be found not to extend to warrant this proof. That act, giving powers which did not exist before, and which, except for the act, would be in violation of the Bank of England charter, must be strictly followed; and we take it to be indisputable, that if a partnership, illegally carrying on business, draws bills, for instance, in a manner not conformable to those newly created powers, it is competent for them to resist payment of them, by taking the objection of that very illegality. The party concerned in that illegality is as much bound to know the law as the partnership, and the creditor and debtor stand in *pari delicto*. In this case the returns were not correctly filed of the change of interests of the several parties who died and became bankrupts, according to the 8th section of the act. Now, as to the first point, by the 7 Geo. 4. c. 46. s. 1., it is provided, "That from and after the passing of this act it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five

7 G. 4. c. 46.
s. 1.

miles from London, payable on demand, or otherwise at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid: provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding." Thus the liability of all partners is declared. The 9th section shows how that liability is to be worked out; it enacts, "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission

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of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership." The words "shall and lawfully may" must be construed to be obligatory and mandatory, and in no other way can proceedings be had. Then the 12th section goes on to provide, "That all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered or entered up as aforesaid, in any action, suit, or proceedings in law or equity, against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such

copartnership." This shows how the property of the company is to be reached. Judgment must be obtained, in the first instance, against the officer; and then section 13 enacts, " That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained : provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership;"—pointing out how the property of individual members is to be made liable. But until judgment is obtained against the officer, individual property cannot be resorted to.

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MARSTON
and
ex parte
BROOME.
In the matter
of
MARSTON.
7 G. 4. c. 46.
s. 13.

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Ex parte
MARSTON
 and
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BROOME.
 In the matter
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At law it is held, that it can only be inquired if the party from whom recovery is sought was a partner at the date of the judgment. Extraordinary remedies and powers being given by the 7 Geo. 4. c. 46., you cannot superadd to them the remedies and powers against ordinary partnerships existent before the statute. If this be a partnership within the 7 Geo. 4. c. 46., then judgment must be obtained before a debt is established as against an individual member, and, *ergo*, before it can be proved. If it is an ordinary partnership, and liable to the effect of the 6 Geo. 4. c. 16. s. 62., then it must be so treated throughout; and the rule, that a joint creditor cannot prove under a separate fiat against one, so long as any member of the firm remains solvent, applies.

6 G. 4. c. 16.
 s. 62.

Upon the second point, the 6 Geo. 4. c. 16. s. 62. enacts, "That in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm." This section clearly applies only to subsisting partnerships; it is, "that in all commissions against one or more partners of a *firm*." But we say that by reason of the prior subsisting bankruptcies against other members the company as a firm was dissolved. It is so decided in *ex parte*

Morris in the matter of *Desormeaux* (a), and recognized as law in *ex parte Bauerman* in the matter of *Lomax*. (b) [Sir J. Cross:—You are aware that in *Morris's* case there was no joint property. If a partnership were dissolved by agreement, and one member became bankrupt, would it not still be a subsisting partnership as to all prior contracts.] It would, certainly, as to all prior contracts? There is, however, a great difference between co-partners and co-contractors. Equity would follow the assets as to prior contracts; but because the bankruptcy of one member is *ipso facto* a dissolution, it would not be an existing partnership for the purposes of the 62d section.

As to the third point, we contend that the deposition of debt by Mr. *Whittenbury* is bad in two respects; 1st, that it does not show that notice of the dishonour was given to the company, who were not parties to the bill otherwise than as indorsers; and, 2dly, that it states that this bankrupt was indebted, together with certain other persons, whose names were enumerated in the return to the stamp office; some of them had become bankrupts, and consequently not they, but their assignees and estate, were indebted; so that the deposition is both defective and false. As observed by one of your Honours in *ex parte Hall* (c), "it is not enough now to prove the necessary facts, but they must appear on the face of the affidavit; and therefore, although in fact notice may have been given, yet it is necessary the deposition should show that fact on the face of it."

Lastly, with regard to the choice of assignees, we say it is defective, because if you allow the joint creditor to prove it can only be under the law as applicable to ordi-

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(a) *Mont.* 218.

(b) *Ante*, p. 569; 3 *Dea.* 476.

(c) *Ante*, 428, 429, 430.

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nary partnerships, and then the 17th section directs that the same assignees shall be chosen as those in an existing fiat against other members. But we do not wish to press that objection, because power is given to the Lord Chancellor to order the proceedings to be carried on under the prior separate fiat.

Mr. *Swanston* and Mr. *Archbold*, for the respondent, Mr. *Whittenbury*, were not called on to argue the case.

Sir *John Cross* :—

The evils of
 joint stock
 banking com-
 panies, as re-
 gards certificates
 of individual
 members in
 case of bank-
 ruptcy, pointed
 out.

This case shows in a very strong light the evils to which these modern joint stock companies give rise to the unfortunate persons who become shareholders. It points out to us that the old law prohibiting such speculations was most wise. That law is so old that the reasons for its introduction have long since been forgotten, and it is not till it is broken down and repealed that all the evils which gave rise to it formerly, recur to us with their original force, and become apparent. Here is evidence that many shareholders in this bank have severally become bankrupt; and as the creditors of the bank have a controlling power over their several certificates, many may be unable to obtain them, owing to the physical difficulty of obtaining the requisite signatures from their very number. Now this petition prays that the proof by Mr. *Whittenbury* of a joint debt due from the company against the separate estate of this bankrupt may be expunged, and that the choice of assignees which ensued from the admission of that proof may be vacated. In support of the petition several points have been made. It is said this is not a partnership within the meaning and operation of the 6 Geo. 4. c. 16. s. 62., because it is a banking company under the special provisions of the 7 Geo. 4. c. 46., and by the construction

of those provisions excluded from the 62d section. But I can see no difference between this and any other partnership. By the general law, if a creditor wishes to proceed against a partnership he must sue all its members by name, but cannot touch the property of any individual of the firm till he has obtained judgment against all. The 7 Geo. 4. says that these companies, instead of being sued thus collectively, shall be sued in the name of their public officer, and when judgment is obtained against him you may take the property of all or any member. This is precisely as though all were sued under the general law. The two cases are parallel. The act only places the registered officer in the place of each partner, and saves the trouble of suing them collectively. How then stands the law of bankruptcy as to partnerships? You cannot touch the property till judgment obtained. But for this purpose a fiat is a statutory execution, and immediately on its issuing that execution is thereby levied, and the effects get into the hands of the creditors; and though in bankruptcy a joint creditor cannot touch the separate estate till a surplus arises after payment of all the separate creditors, the 6 Geo. 4. c. 16. s. 62. gives express power to go in to prove, for the purpose of voting in the choice of assignees, and controlling the certificate.

In the next place, it is said that the 62d section applies only to subsisting firms, and that this is not such, owing to the prior death and bankruptcy of some of its members. It is said that the Vice Chancellor has thus decided in the case of *ex parte Morris* in the matter of *Desormeaux* (a); but the expression there used is very equivocal. As a general rule, every partnership is dissolved by bankruptcy; but these banking companies are

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(a) *Supra*, 572.

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peculiarly subsisting, notwithstanding any individuals become bankrupts; they exist in perpetuity by the very mode in which the 7 Geo. 4. treats them. They are ever varying in their component members, but still there is the company subsisting just like a corporation. For this purpose, at least, they subsist until all their accounts are wound up; otherwise, upon the sale of any share upon the death or bankruptcy of any member, the concern would be closed. But the same body go on under the same name, without interruption from these accidents.

Again, it is said the debt should be expunged, because the deposition was defective, in not setting forth that which is a fact, that notice of the dishonour was given to the company. This is an argument *strictissimi juris*. I do not think the commissioners are bound by the strict rules of evidence in the admission of proofs, and I conceive that if the creditor had pledged his belief, extra the deposition, that notice of dishonour had been given, provided that turns out to be the truth, the commissioner is justified in allowing him to prove; and I am inclined to doubt this petitioner's right to contest the proof on the question of the nature of evidence received by the commissioner, unless he can show that under any circumstances the proof was inadmissible. As to the fourth point taken, I consider it abandoned, and need say nothing about it. Upon the whole view of this case I can see no grounds to justify the expunging this proof, and therefore the petition must be dismissed.

Sir G. Rose:—

The fate of these two petitions is so obvious, that I should not think it necessary to say one word beyond granting the second and dismissing the first, were it not for the respect I feel for the counsel who have been

heard upon the latter. As to the petition of the assignees under this fiat, we have merely to say they must take the order for delivery up of the proceedings; but it will go without costs, as none are prayed. As to the first petition of *Charles Marston*, praying to remove the assignees, the expunging the debt, and consequent reduction of the proof, will not necessarily have the effect of rendering any change in the choice of assignees requisite. It has been decided by this Court (a), that if the proof were expunged on the ground of the informality of the deposition (which however I do not consider defective), it would not affect the question of the removal of the present assignees. I consider it quite competent to this creditor to prove, as the law now stands, against this bankrupt as a partner, the 7 Geo. 4. only altering the law in giving more extensive and additional remedies in cases of joint stock banks. The dissolution, such as it was, by the prior bankruptcies, has not the effect which has been contended for. With regard to the case of *ex parte Morris* (b), I cannot take the same view of it as that to which the argument has been pressed. There the debtors were the five grantors of an annuity; they were totally unconnected, except in that transaction; and there never was any joint estate. They were mere joint contractors, and not partners; and the decision turned more on the question, what was legal solvency, than any thing else.

I never understood that case, or any other, to decide that partnerships were dissolved to the extent contended for by death or bankruptcy, but that it merely applied to joint contracts, and a wide distinction has been always drawn between joint contracts and partnerships for general or limited purposes. Ordinarily speaking, death

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(a) *Ex parte Milner*, 3 Dea. & Ch. 235.(b) *Supra*, 572.

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or bankruptcy dissolves a firm, but for many purposes it still subsists. In the case of death the executors go on, and in the case of bankruptcy the assignees; they proceed in winding up the accounts and dealing with the assets; and bankruptcy is not a total dissolution till all the affairs are wound up; and the partnership still subsists to the extent of giving creditors the right of proof for the purposes mentioned in the 62d section, and to have an order to keep distinct accounts of the joint and separate estate.

The evils of
joint stock
banks.

I readily concur with my learned colleague in his observations on the evils of these joint stock banking companies. The controul which joint creditors have over the certificates of individual members becoming bankrupt ought to serve as a warning to traders to deter them from embarking in such speculations.

Petition dismissed with costs.

C. of R.
Feb. 17,
1840.

Ex parte RICHARD LAW in the matter of WILLIAM HAGUE, SAMUEL HAGUE, and WILLIAM SHATWELL.

A joint stock bank, by their registered officer, held to have a right to prove against the joint estate of *A.*, *B.*, and *C.*, although *B.* and *C.* were members in the bank, and there were creditors of the bank unpaid, who might also prove for

THIS was a petition by *Richard Law*, as the registered officer of the Imperial Bank of England, for liberty to prove against the joint estate of the three bankrupts.

The three bankrupts carried on business together. *William Shatwell* also traded on his own account, and the two *Hagues* also carried on another business jointly.

the purposes of 6 Geo. 4. c. 16. s. 62. against the separate estates of *B.* and *C.* respectively.

Proofs between partners are never governed by reasoning founded on probability of surplus; that is not dealt with till it arises.—Per Sir G. Rose.

The two *Hagues* were also shareholders in the Imperial Bank, which was established under the 7 Geo. 4. c. 46.

On the 27th September 1839 a fiat issued against the three bankrupts, and they were then indebted to the Imperial Bank on their banking account to the extent of 2,377*l.* 5*s.* 9*d.*

The bank applied to prove, but the commissioners rejected the proof, on the ground, that the two *Hagues* were partners and shareholders in the Imperial Bank.

Mr. *Swanston* in support of the petition after stating the facts, was stopped by the Court.

Mr. *Anderdon* :—The Imperial Bank has long since notoriously stopped payment (*a*), leaving many of its debts unpaid; and it would be contrary to all principle, as long as that is the case, to allow one partner to prove against another. It is established that a partner cannot prove or claim in competition with the creditors of the firm or with the separate creditors, until the joint creditors are all paid. (*b*) Here the petitioner seeks to prove as the officer of the bank, but not under ordinary circumstances. One set of insolvent partners are proving against another set of partners, who have become bankrupt without having paid the joint debts.

Sir *George Rose* :—There is no point about the character in which the petitioner applies. The act of 7 Geo. 4. only ended the necessity of an order to enable one person to prove on behalf of many jointly

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Ex parte
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(*a*) It stopped in April 1839. See *ex parte Marston*, ante, p. 576.

(*b*) See 1 *Mont. & Ayr. B. L.*, p. 194.

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interested. There is no doubt as to the rule you allude to, but it does not apply in this case, because the petitioner is not seeking to prove against the two *Hagues*, as members of the company, but against them jointly with a third person who is not a member; that makes all the difference. Some question might be raised as to the payment of the dividends, and then the Court might make some protective and qualifying order.

Mr. *Anderdon* :—The Court has decided in *ex parte Marston* (a), that each individual creditor of a joint stock banking company might, under the 6 Geo. 4. c. 16. s. 62., prove the debt due to him by the company against each member of it; that is, in this case against the separate estates of the two *Hagues*: such I take to be the effect of that judgment. If that be so, as the portion of surplus of the joint estate of these three bankrupts which would belong to each of the two *Hagues*, and the surplus of their separate estates, would go to such joint creditors of the company as, on the authority of *ex parte Marston*, might prove, it would to that extent relieve the company; and if you give to the company likewise, while its debts are unpaid, a right to prove, it will give the latter also a right against that surplus, and in effect amount to double proof. The bank would then enter directly into competition with the general creditors, whilst the unsatisfied creditors of the bank would be carrying away such surplus from the general creditors, to the manifest prejudice of the general creditors of the three.

Then there is no security that the dividends upon such proof of the bank, if admitted, would be properly applied in diminution of those outstanding engagements

(a) *Ante*, p. 586.

upon which such separate proofs would be founded; and, consequently, supposing the commissioners were not justified in excluding the formal proof of the bank, the case requires that some guard ought to be put upon the dividends upon such proof, in order to secure the due application thereof for the protection of the creditors at large with reference to these equities.

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Mr. *Swanston* was not called on to reply.

Sir *John Cross* :—It is not questioned that the banking company are creditors of the three bankrupts to the amount of 2,000*l.* and upwards, nor that it is a joint debt of those persons. As such creditors the company applied to the commissioners to prove, but were rejected, on the ground that two of the bankrupts were shareholders in the banking firm. It is virtually admitted by the respondents counsel that that was an insufficient reason to reject the proof; because under the 1 & 2 Vict. c. 96. the public registered officer of the company, is empowered to make such proof against any individual members of the company as though he were no partner, but a mere stranger indebted to the company; and I am of opinion that the commissioners were in error, in rejecting the proof upon this ground. But then it is said, that inasmuch as there are creditors of the company still unpaid, those creditors would have a right of proof against the two *Hagues* as individual members of that company, according to the case of *ex parte Marston* (a); and if the company also were allowed to prove, a species of double proof would ensue. But that authority is inapplicable in the present case: all which that case decided was, that joint creditors of a

(a) *Ante*, p. 576.

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banking firm had a right to prove against an individual member of it, for the purpose of voting and controlling the certificate under the 6 Geo. 4. c. 16. s. 62. In the present case the proof sought to be established is not against the separate estates of the two individual members alone, but against the joint estate of them and a third party who is not a member of the company; and I am of opinion that the proof was improperly rejected, and must now be admitted against the joint estate of the three bankrupts.

Sir George Rose (a):—The proof which it is the object of this petition to place upon the preceedings has been rejected by the commissioners upon grounds so utterly at variance with the established law in bankruptcy that, were it not from respect to Mr. *Anderdon*, who has argued the contrary proposition with an earnestness and a confidence that induces me to think that he feels he is right, I should not consider it necessary to make any observations. It is as well, therefore, to begin by displacing all reliance upon the authority of *ex parte Marston*, which appears to have been pressed upon the commissioner, as here again upon us; and at once to say, that that decision has been entirely misconceived. It may be as well also to add, that the act of parliament (b), which it has been contended does not authorize the officer of the joint stock bank to prove on their behalf, has nothing in the world to do in this case, beyond a mere matter of form; indeed hardly that. For if there had not been this officer, under the authority of the act, the commissioners would not, I think, have been right in hesitating to admit any one of the mem-

(a) The reporters were favoured by a written judgment from Sir G. Rose.

(b) 7 G. 4. c. 46.

bers of this joint stock company to prove for and on behalf of the firm; and at all events an order would, as a matter of course, have permitted one of these parties so to prove on behalf of the whole. All that the act of parliament has done is to have rendered such an order unnecessary. Now the state of the case is shortly this:—The two *Hagues* were respectively proprietors of shares in this joint stock company, and as such consequently partners in it; they carried on also business in partnership together; they also carried on another business in copartnership with *Shatwell*. This latter copartnership of the three was at the bankruptcy indebted to the joint stock banking company in which, as has been already said, the two *Hagues* were holders of shares. Why is not this debt to be proved against the estate of the three? Because it is said that this joint stock banking company is insolvent; that all the joint creditors of this banking concern have a right to prove against the separate estates of each of the *Hagues* respectively; that *ex parte Marston* is an authority for that proposition; that inasmuch as if there be a surplus of the joint estate of *Hague, Hague, and Shatwell*, that surplus would belong to the separate estates of each of the *Hagues* respectively; and that, therefore, if the joint stock bank which includes the *Hagues* be suffered to prove against the estate of the three, which includes also the two *Hagues* with *Shatwell*, to the extent of the dividend upon that proof, they will *pro tanto* diminish the surplus which might be apportionable to the separate estates of the *Hagues*. But, in the first place, nothing can be more extravagantly erroneous than the supposition that the joint creditors of the bank are admissible as creditors against the estates of the *Hagues*, or of either of them; and further, if it were so, that circumstance would not have the least influence against

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the admission of the proof of the bank against the estate of the *Hagues* and *Shatwell*.

The only question that arises when a proof is tendered against parties, some one or more of whom are in partnership with the persons tendering the proof, is this:—Is the estate against which the claim is directed the fund for payment of creditors to whom the claimant is liable jointly with the person against whom he so seeks to prove. If it be so the proof is inadmissible. Now here in what manner is the bank in this case liable with the firm of the three to the creditors of the three? The bank are not proving against the separate estates of any of these three persons, but against their joint estate. But then it is said that in the event of a surplus such proof will, to the extent of the dividend, diminish the proportion of surplus, which would otherwise be carried over to the separate estates respectively. Now as to this, it is an universal rule that proofs are never governed by any reasoning founded on possible or even probable surplus; the whole law and administration in bankruptcy proceeds upon deficiency. The supposition of surplus is not excluded, but it is not dealt with before it arises; and when it arises it comes into existence subject to the equities between the estates upon the taking of all the accounts, and controlled by the interests of all the parties, and by their interests only, in the actual surplus ascertained. It will be found that the equities of estates, even in regard to surplus, are in fact much more conveniently protected and dealt with in the administration of assets as the proof happens to fall upon any estate in particular at the time of making it; but if it were not so the delay which must arise in arranging, and the want of means and machinery for duly arranging all these equities (take, as in this case, some partners who are not bankrupt) would make it

Proofs between partners are never governed by reasoning founded on the probability of surplus; that is not dealt with till it arises.

impracticable to regulate proof by any such refinement. For example, in this case:— Suppose a surplus of the estate of the three, you cannot arrive at what is the proportion of the *Hagues* or either of them without taking the partnership accounts as between themselves, an operation not properly within the province of bankruptcy, nor intended for it, and with which the creditors have nothing to do, nor ought to be embarrassed by. But a very few words will I think show that the equity which is imagined to arise from a supposed surplus is much more conveniently worked out through the means of proof. Now in this case the creditors of the bank, who in regard that the *Hagues* are members of the bank are also creditors of the *Hagues* as such, have no right to prove against the estates of either the *Hagues* for the purpose of taking dividends out of the estates of the *Hagues*. They have no such right. They are entitled to have an order to keep distinct accounts of the joint and separate estates of the *Hagues*, to prove for the purpose of voting in the choice of assignees; because as the joint estate of *Hagues* in the bank may be more or less administered by such assignees under the order for distinct accounts, they are interested in the choice of assignees, and as the *Hagues* are released from debts as well joint as separate by their certificate they are entitled to a vote against it. If *ex parte Marston* is supposed to have decided more than this it has decided what is not law; but it will be found that more than this it has exclusively and specifically excluded. Now when the bank have proved against the three (the *Hagues* and *Shatwell*) the dividend upon that proof forms part of and goes into that joint estate which under the joint order is the fund to which the creditors of the bank are at liberty to resort, or is payable to the bank, the solvent members of which are

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still responsible for all the debts. With these observations I have only to express my opinion that there is no ground for resisting this proof; but as there seems to have been an honest misunderstanding of the law there must be no costs. The assignees will of course take theirs out of the estate.

The Court directed that the question of proof should go back to the commissioners, with an intimation that the petitioners were entitled to prove against the estate of the three.

C. of R.
 Nov. 6,
 1839.

Ex parte GEORGE SMITH and JOSEPH TIBBETTS.—In the matter of THOMAS LANE PARKER.

On petition to declare bankrupt a trustee, and for conveyance of mortgaged premises, neither the assignees, bankrupt, nor heir of mortgagor need be served. Being served, the petitioner must pay their costs.

THIS was a petition praying, as against the assignees, that the bankrupt might be declared trustee of certain mortgaged premises for the petitioners, as executors of *Thomas Askey* deceased, and that all proper parties might join in the conveyance.

The assignees and bankrupt, and the heir of the deceased mortgagor, had been served with the petition.

Mr. Webster for the petitioners.

Mr. Pullen for the assignees and the bankrupt.

Mr. E. Chitty for the heir of the mortgagor.

Per Curiam:—Take the order, but the petitioner must pay the costs of bringing the several parties before the court. They need not have been served; the order of the court, which is quite of course, would have made a good title.

Ordered accordingly.

Ex parte PHILLIS YOUNG and JOSEPH YOUNG.
— In the matter of ELIZABETH GOWEN and
ARTHUR SHANKS.

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IN this case a petition was presented, claiming to be entitled to security for a joint debt upon the joint property of the bankrupts and the separate property of one of them, and the Court entertained no doubt but that its extent was as the petitioners insisted.

If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the Court, *semble*, the Court will not give costs against them.

Mr. *Swanston* for the petitioners.

Mr. *Bethell* for the assignees.

Sir *George Rose* :— Why did the assignees, on so clear a case, bring the parties here? Ought they not to pay the costs?

Mr. *Bethell* :— I should not have advised any trustee to part with money, circumstanced as this is, without the advice and sanction of the Court.

Per Curiam :— As you state that to have been your opinion we cannot give costs against you.

Ordered, each party taking his costs out of his estate.

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A fiat cannot be superseded on the mere ground of concert; but, *sacra*, a fraudulent fiat, at the instance of the bankrupt, where there are no assets to divide. A petitioning creditor's debt, made up of a sum paid in part discharge of a bill, and the remainder unpaid, and the bill being in the hands of an adverse holder, bad. Assignee under a fiat superseded for fraud cannot have his costs of appearing from the petitioning creditor.

Ex parte ANDREW CALDECOTT and the general body of creditors.—In the matter of JOHN HEATH and EDWIN HEATH, bankrupts.

THIS was a petition to annul a fiat, on the ground of concert and fraud. (*a*)

A fiat issued against the above-named bankrupts, drapers at Totness, Devonshire, on the 29th October 1838; the petitioning creditor being *Samuel Heath* of Totness, blacksmith, their father. The debts due at the time of the bankruptcy amounted to 2,329*l.* 8*s.*, including the debt of 510*l.* alleged to be due by them to their father; the debts due to the petitioners and other London creditors making up the residue. The assets amounted to 180*l.* only, 80*l.* of which were considered as bad and doubtful, nor were there any stock in trade or other effects. On the 22d August 1838 two of the petitioners received a letter from a Mr. *Windeatt*, then acting as solicitor for the bankrupts, stating they had laid their affairs before them, and offering a composition of 6*s.* in the pound to the last-mentioned petitioners and other London creditors. The London creditors held a meeting, and in consequence sent an agent down to examine into the bankrupts' affairs and report thereon.

(*a*) Mere concert is not sufficient; but the words of the 1 & 2 W. 4. c. 56. s. 42. are,—“And be it enacted, That from and after the passing of this act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented and shall be now pending.”

On the 3d September 1838 *John Heath* convened a meeting in London of their London creditors, and again offered the composition of 6s. in the pound, and stated there was at that time an execution on the premises for 450*l.*, but that if the composition were accepted the execution creditor would withdraw. In consequence of the unfavourable report of their agent, the creditors at that meeting refused to accept this offer, and pressed that the bankrupts should assign all their estate and effects in trust for the creditors, as to which *John Heath* said he would consult a friend, for which purpose he left the room, but never returned, but quitted London the same night, without giving any reply. The execution referred to was levied at the suit of *James Pullin*, the brother-in-law of the bankrupts, and *Richard Heath*, their brother, as trustees under the marriage settlement of *John Heath* with *James Pullin's* sister, for the alleged debt of 400*l.*, on *John* and *Edwin Heath's* joint bond; the action on which it was founded being by writ of summons served on the bankrupts in July 1838, and, by their suffering judgment to go by default, the execution was levied on the 13th August 1838. The bankrupts paid 200*l.* on account of the execution, which remained on the premises for two months, during which time the bankrupts carried on their business as usual, receiving money on sales, and retaining part for their own use, and to pay another execution issued subsequently. *Presswell* was attorney for this latter execution creditor, as also for *Samuel Heath* the bankrupts father, and for the bankrupts. About the end of August execution was levied on the bankrupts premises, at the suit of their father, for about the sum of 337*l.* 5s.; but it appeared that they were only then indebted to him in 80*l.* and interest. The bankrupts father was then under certain liabilities for

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the bankrupts, in respect of bills of exchange and notes accepted for their accommodation; and on the 23d October the father paid the holders a sum of 20*l.* with interest, in part discharge of a much larger bill, thereby making up the sum of 100*l.* due to *Samuel Heath* the father, and, as the petitioners alleged, this was done in collusion with the bankrupts, to enable him to substantiate a good petitioning creditor's debt. On the 5th and 6th October some of the petitioners took proceedings against the bankrupts, according to the 8th section of the recent abolition of arrest act; but the bankrupts did not comply with the requisitions of that statute, and thereby committed an act of bankruptcy. The twenty-one days from service of the affidavits and notices requiring payment of the debts of the last-mentioned petitioners expired on the 26th and 27th October; and on the 23d of that month it was that the father paid the 20*l.* in part discharge of the bill already mentioned. On the 25th he committed a voluntary act of bankruptcy, by denial to a creditor, and keeping house. On the 23d *Samuel Heath*, the father, swore his affidavit of debt for 100*l.* (as petitioning creditor) to ground the fiat. The docket was struck on the 24th, and the fiat dated the 29th of October. In the affidavit of debt *Samuel Heath* swore to a debt of "100*l.* and upwards," and stated that his only security was a bill of exchange, dated 23d March 1838, for 100*l.* (the 80*l.* was advanced by him to take up this bill in part), and also a receipt (for 20*l.*) dated 23d October 1838, signed by the holder of the bill upon which the 20*l.* had been paid. *S. Heath*, the father, did not prove his debt or any other debt at any subsequent meeting. The petition charged, that the father was not a creditor, and had no legal right of action against the bankrupts to the amount of 100*l.* at the date of the fiat, and that

he was not a *bond fide* creditor at that time; that at the time the first execution issued against the bankrupts effects, their stock and assets amounted to 1,100*L*, which was reduced, at the period of a subsequent sale under another execution, to the value of 345*L*, the bankrupts having been allowed to deal with it as they pleased in the meanwhile; that the petitioners proved their several debts under the fiat, in ignorance of the true state of the bankrupts affairs; no assets had been realised under the fiat, and such as might be realised would not pay the expenses even of working the fiat; that the fiat was sued out by the father in collusion with the bankrupts, and for the bankrupts benefit, and to protect them against their *bond fide* creditors, and not for the purpose of making the same available for the satisfaction of the creditors; and it prayed that the fiat might be annulled, at the costs of the petitioning creditor.

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Mr. O. Anderdon in support of the petition.

[Sir G. Rose:—The first difficulty is the length of Laches.
time elapsed since the fiat issued. If you have any affidavit so as to get over that the course is very plain.]
This petition was ripe for hearing before the long vacation; and it appearing to be a hopeless case the respondents never attempted to press it on. [Affidavits were then read accounting satisfactorily for the time elapsed.]
[Sir G. Rose:—Concerted fiats are not, merely as such, impeachable since the recent enactment (a); but you may still get at the same result by establishing a concerted act of bankruptcy. (b) Here, however, there is another act of bankruptcy shown on the face of your petition; I allude to that under the imprisonment for

(a) 1 & 2 W. 4. c. 56. s. 42. See *ante*.

(b) See *ex parte Mills*, 1 Mont. & Ayr. 311.

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debt act. That would be sufficient to uphold the fiat at law, and as between the assignees and the creditors; but you apply here on equitable grounds, and the assignees consent to the annulling.] There are no assets to divide; no good can possibly result to the body of creditors. All this was well known to the petitioning creditor, whose only motive was to screen the bankrupts from payment of their just debts.

Then, again, with regard to the petitioning creditor's debt, we dispute that, and say it was not sufficient. [Sir *George Rose*:—The petitioning creditor had only a debt of 80*l*. due to him, even assuming that to be *bond fide*. The 20*l*. was paid in part discharge of a bill for a larger amount; it was not paid in discharge of the whole, nor was the bill, consequently, delivered up to him. As to that sum, therefore, the petitioning creditor stood as a mere surety for the bankrupts paying a part only and not the whole of the debt. He could not prove that as a debt, because the 6 Geo. 4. c. 16. s. 52. gives him no power. If he could not carry it on to proof it cannot stand as a good petitioning creditor's debt.]

In *ex parte Gaitskell re King (a)*, a fiat taken out in order to defeat a judgment creditor, where there are no assets to be administered, was annulled. There, too, the fact of mere concert was held not to be sufficient. The features of that case were precisely like those in the present. Before the recent statute, 1 & 2 Will. 4. c. 56. s. 42., commissions issued at the instance of the bankrupt were supersedeable, as in the case of *ex parte Gane re Keel (b)*. But that act was never intended to sanction a *fraudulent* fiat such as that now before the Court. The words of the act are, that fiats shall not be superseded "by reason *only* that the com-

(a) 1 *Mont. & Ch.* 160.

(b) *Mont. & M.* 599.

mission," &c. were concerted; and where the Court detects a fraudulent motive, namely, to screen the bankrupt from payment of his creditors, and there are no assets to divide, it is still bound to supersede, the statute not being applicable.

Ex parte Poole (a) shows how strongly opposed the law is to fraud and concert in issuing commissions. There, though the bankrupt had obtained his certificate six months back, and had re-entered into trade, the Lord Chancellor superseded the commission, because it was taken out with a view to favour the bankrupt, and secure to his use all his separate effects; his Lordship observing, "that when the whole transaction appeared to be such a mere trick and contrivance it was impossible for the Court to let the commission stand. It will never permit its process to be turned into an engine of fraud."

Mr. *E. Chitty*, on behalf of the assignee, consented to the prayer of the petition.

Mr. *Bethell*, for the petitioning creditor, upon the suggestion of Sir *George Rose* as to the petitioning creditor's debt, declined to argue the case further.

Sir *John Cross*:—

There can be no doubt, looking at the facts of this case, that the fiat was not sued out for the benefit of creditors, there being nothing to divide, but, in collusion with the bankrupts, to whitewash them from their just liabilities.

As to the petitioning creditor's debt, that is admitted to be bad, and it is most singular that it was found

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(a) 2 Cox, 227.

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necessary to advance the 20*l.* so as to make out a good petitioning creditor's debt of 100*l.*, although it had previously been pretended that the father was an execution creditor for 337*l.* in August 1838. The payment of that 20*l.* could not have been for any other purpose than that of making up the petitioning creditor's debt, for there does not appear to have been the least pressure on the part of the holder of that bill. When that amount was paid there had been no act of bankruptcy committed. But on the next day a docket is struck, and on the following, the 25th, the act of bankruptcy is conveniently committed, the fiat not being taken out till the 29th, in order that the bankruptcy might not interfere with the prior dealings with the estate on the part of the bankrupts family.

No one can doubt but that this is a most fraudulent fiat. Although a mere concerted fiat might be unimpeachable, yet the statute never was intended to screen fraudulent fiats, and therefore this must be superseded at the costs of the petitioning creditor.

Sir George Rose concurred.

Mr. F. Chitty then asked for the costs of this application incurred by the assignee against the petitioning creditor. The appearance of the assignee to the petition was necessary, but there was no fund or estate out of which he could have his costs, except from the petitioning creditor, who, as a party to the fraud, ought to bear the full burden of the consequence of his conduct. The assignee had been chosen in order that the *bond fide* creditors might rescue the fiat from the entire control of the bankrupts and their family, and at the instance of those creditors he had accepted the trust.

Per Curiam.—We cannot give the assignee his costs against the petitioning creditor, but no doubt the creditors who brought him forward will see him exonerated.

Ordered, That the fiat be superseded, with costs, with liberty to the petitioners to take out a new fiat if they thought fit, to be directed to a London commissioner, and the proceedings to be transferred accordingly.

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Ex parte THOMAS SNAPE. — In the matter of
JOHN RANSFORD.

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THIS was a petition by the public registered officer of the Leamington Bank, established under 7 Geo. 4. c. 46., praying liberty to prove 1,000*l.* against the bankrupt's estate, and to stay the certificate, and if necessary that accounts might be taken.

By the company's deed of settlement the 1st section provided, that they should become partners, to be managed and conducted pursuant to the several rules, regulations, and provisions therein-after contained. By clause No. 3. the capital of the company was to be 200,000*l.*, divided into ten thousand shares of 20*l.* each, and it was provided that the board of directors should have the sole power to allot to subscribers or purchasers such of the said shares as had not at the date of the now stating indenture been subscribed for and allotted, and that the holders of shares should be designated by the name of proprietors. By the clause No. 12. it was provided, that every proprietor of shares should pay the instalment of 5*l.* per share on each; and every share of the said capital fund subscribed for or holden

Money due for calls in respect of shares in a joint stock bank does not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder without an account first taken.

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by him on or before the 12th day of May then instant ; and that a general meeting specially called for the purpose by the board of directors for the time being should have power to come to a resolution that all the proprietors or holders for the time being of the shares in the capital of the said company, or such of them as should for the time being have been subscribed for, should be called upon to pay a further instalment on such shares, in addition to the sum or sums which should then already have been or might for the time being have been previously paid in respect thereof. By the clause No. 13. it was provided, that in case any instalment should remain unpaid for the space of one calendar month after the day appointed for the payment of any call, such instalment should carry interest at the rate of 5*l.* per centum per annum from the day on which the same ought to have been paid ; and that no proprietor should be allowed to exercise any right by virtue of the now stating indenture, or be entitled to any dividend, bonus, or other benefits under the same, until he should have paid the amount of every call in respect of the shares to which he might be entitled, together with all the interest which should have become due and payable thereon. By the clause No. 33. it was provided, that the business, affairs, and concerns of the company should be under the exclusive management and control of a board of directors, which should be composed of not more than six nor less than four proprietors to be from time to time appointed in manner thereafter declared ; clause No. 14. declared the shares forfeited unless the calls were paid up, and power was given by clause 67. to the directors to remit such forfeitures.

The bankrupt subscribed for 100 shares, and paid the 5*l.* instalment on them, and in November 1835 he subscribed for 100 more shares, on which he also paid the

5*l.* instalment. In January 1837 two calls were made of 2*l.* 5*s.* each, one to be paid in April and the other in August then next. These, amounting on his shares to 1,000*l.*, were never paid, and in August 1839 he became bankrupt. Proof was tendered to the commissioners, and rejected. The petition stated, that over and above the 1,000*l.* a balance would be found due from the bankrupt to the company if the accounts were taken.

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Mr. *Girdlestone* and Mr. *Rolt* for the petitioner:— This case is out of the general rule, that one partner cannot sue his copartner, even if it were a private partnership. Here is an ascertained debt, which entitles the bank to prove. It is the amount of capital which the bankrupt agreed to bring in under the deed of covenant, and is independent of the taking of accounts. As it happens, this bank is insolvent, and all its resources, and this debt among them, will be required to pay its debts. If no bankruptcy had intervened, and an action at law had been brought for these calls, that could not have been stayed. [Sir *George Rose*:—How can we allow this proof without taking the accounts of the firm?] This claim is altogether independent of the partnership accounts. If it appeared on action brought that the partnership liabilities would consume the whole fund claimed, and that equal sums were also required from each individual member, no objection could be raised to the action, nor could there be any ground for an injunction.

The *Counsel* for the respondents were not called upon.

Sir *John Cross*:—There is no allegation in this petition that the debt in question will turn the certificate,

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and we cannot travel out of it to ascertain the fact. But it is said that the bankrupt by his affidavit has cured that defect; that affidavit cannot be used by the petitioners unless it is first used by the respondents, or proved in other ways. It is not, however, necessary to go into that question. It is an established general rule, that one partner cannot prove against another in competition with joint creditors, for a debt arising out of the partnership, and there is nothing in this case which excepts it. This is nothing more than the case of two parties, to simplify it, agreeing on the formation of a partnership to bring in a capital of 1,000*l.* each, and upon a certain event to bring in more. Each has brought in the first 1,000*l.*, and there is no evidence that the party claiming a right of proof has brought in that which he seeks to oblige the bankrupt copartners to bring in. It would be contrary to principle to allow this proof, without first taking the partnership accounts. This petition must therefore be dismissed.

Sir *George Rose* :—If this proof were admitted, the bank being insolvent, then, as its creditors have each a right against this individual partner, there would be a double proof. On the face of the deed there is no dry legal debt capable of proof, and, *a fortiori*, in the case of one partner seeking to prove against his copartner, must the petition be dismissed.

Petition dismissed.

Ex parte WILLIAM GEORGE PRESCOTT,
GEORGE GROTE, LEVI AMES, DANIEL
CAVE, and CHARLES GROTE.—In the matter
of WILLIAM PHILLIPS.

C. of R.
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1839.

THIS petition, amongst other things, prayed that the petitioners might be admitted to prove a debt of 1,162*l.*, under the fiat against *William Phillips*, for the purpose of voting in the choice of assignees, and of assenting to or dissenting from the certificate.

The petition stated that the fiat dated the 31st July 1839 issued against the above-named *William Phillips*.

Phillips was a member of the Central Bank of Liverpool, which was established under the 7 Geo. 4. c. 46., and his name was entered as one of the members or partners of the copartnership, in the accounts or returns which in pursuance of the act were made out and delivered at the stamp office in the form required by the 4th section of the act, and in particular in an account or return made on or about the 2d November 1838; on which day *William Phillips* was and had been for some time before a member or partner of the copartnership. The petitioners discounted, in the way of their business as bankers, and became the holders of five several bills of exchange; that is to say, a bill dated the 12th January 1839 for 250*l.*, payable at three months date; another dated the 31st January 1839 for 184*l.* 1*s.*, payable at three months date; another dated the 5th February 1839 for 198*l.*, at three months date; another dated the 12th February 1839 for 200*l.* at three months date, and another dated the 14th February 1839 for 300*l.*, at four months date; all of which were indorsed by the Central Bank of Liverpool, and were all dishonoured and unpaid at the several times when they became due, and notice of dishonour was duly given to the Central Bank of Liverpool, whereby the petitioners,

A. appeared, by the return under the Joint Stock Banking Act, 7 G. 4. c. 46. to be a shareholder up to Nov. 1838. He then agreed to assign his shares to *B.*, who was appointed by the company a director in respect of those shares. In Feb. 1839 the company indorse bills to petitioners. No new return is made under the 8th section, and not till March is the deed of transfer executed between *A.* and *B.* —Held, that *A.* continued a partner to the world until March, and therefore liable under the proviso in the 1st section to payment of the bills. Proof against *A.*'s estate admitted.

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as such holders thereof, became creditors of the bank for 1,162*l.* 1*s.* On the 24th August last (being the first meeting under the said fiat) the petitioners applied to prove the said debt under the fiat against *Phillips*, as such member, for the purpose of voting in the choice of assignees under the said fiat, and a copy of the return, so made, and filed at the stamp office, certified under the hand of one of the commissioners of stamps, and duly verified in that behalf, was produced on the part of the petitioners in support of the proof. The proof was objected to, and in opposition thereto it was alleged that on the 9th November 1838 *Phillips* sold his shares in the bank to one *Edgar Bowyer*, and that he thereupon gave notice of the said sale to the bank, and directed them to transfer such shares to *Bowyer*; but the transfer of the shares was not actually signed and completed until the 9th March 1839, which was after the bills had been indorsed by the bank, and no account or return was made or delivered by or on the part of the bank to the commissioners of stamps in pursuance of the act, subsequent to the return of the 9th November 1838, until the 25th March 1839, when a return was made in which the name of *Phillips* was not entered, but the name of *Bowyer* was set forth as a member or partner of the copartnership.

It was further alleged, that, notwithstanding the non-completion of the transfer, the purchase money for the shares was fully paid in January 1839, and that *Bowyer* was previously to that period recognized and treated as a shareholder in respect of the said shares of *Phillips*, and was in December 1838 appointed one of the directors of the bank.

The commissioners thereupon rejected the proof, on the ground that, inasmuch as the bankrupt had sold his shares in the month of November, he had ceased to have any interest or concern in the bank, and that con-

sequently he could not be held liable as a member or partner in respect of the subsequent engagements of the bank, and that, as to the transfer of the said shares not having been made until March, they considered it of no importance, because the bankrupt had notified the sale to the bank, whose duty it was to prepare the transfer, and that *Bowyer* had been recognized and treated by the bank as the proprietor of the shares.

It was submitted, on behalf of the petitioners, that the liability of the members whose names appeared as such on the return filed at the stamp office continued, although they had actually sold their shares, or parted with their interest therein, until by some subsequent return omitting their names it should appear that they had ceased to be such members or partners, or notice thereof should have been otherwise given to the parties dealing with the bank; and that, notwithstanding such alleged sale, the bankrupt continued in point of law, for the purposes of the act of parliament, to be a member of the copartnership, and liable as such.

Mr. Russell and *Mr. Anderdon* for the petition:—It is not questioned that the bankrupt was a partner of this bank in November 1838; but it is said that, by an agreement between him and *Bowyer*, entered into about that time, for the sale of his shares, the bankrupt's liability ceased altogether. The agreement was subject to the approval of the company, and in point of fact a complete transfer of the shares was not made till the middle of March 1839. In the meantime the bills were indorsed to the petitioners; and since at most *Bowyer* only had an equitable title to the shares, the legal title to them remained in the bankrupt, and he continued liable, as between him and the world, to all the transactions of the bank, till by a complete transfer the legal title was divested. The respondents seem to rely on

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the circumstance of our having proved against *Bowyer's* estate as an objection to our proof against *Phillips*. But he is also an indorser of the bills in question, and it is in that character that we prove against *Bowyer*, and not as recognizing the transfer of the shares to him to have been complete. But even assuming our previous arguments to be untenable, there is this strong circumstance, that the 7 Geo. 4. c. 46. makes the bankrupt still liable. The 1st section provides, "That such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding;" and the 4th section provides, that a return of the names of the members shall be filed at the stamp office. Then the 6th section declares, "That a copy of any such account or return so filed or kept and registered at the stamp office, as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps

for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return;" and section 8. enacts, "That the secretary or other officer of every such corporation or copartnership shall and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in manner herein-before directed, and cause to be delivered to the commissioners of stamps as aforesaid, a further account or return, according to the form contained in the schedule marked (B.) to this act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be made payable; and such further accounts or returns shall from time to time be filed and kept and entered and registered at the stamp office in London, in like manner as is herein-before required with respect to the original or annual

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account or return herein-before directed to be made."

So that as long as we find the name of Mr. *Phillips* on the return delivered into the stamp office, so long does he remain a partner, to all intents and purposes as between him and the world, and in no way could he have discharged himself but by procuring a corrected return to be filed. [Sir *George Rose* :—If this were the case of an ordinary partnership even, all you need do would be to show, that the bankrupt appeared to the world as a partner at the time when the bills were indorsed, by production of partnership deeds or books, and then the question would be, what would be the effect against you of a contract between one member of the partnership and a third party for the sale of his share. The onus of showing that the seller had no longer a beneficial interest would be thrown on him. I think you might safely leave the case there.]—And we contend, the bankrupt never determined his character of partner, in the sense of the 7 Geo. 4. c. 46., till long after the bills came to the hands of the petitioners. He remained legal owner of the shares, and as such the Court must deal with him, and cannot inquire whether he was or not a partner in equity.

Mr. *Swanston* and Mr. *Dixon* for the assignees:—The return is no evidence that the bankrupt was a partner, except at the date of the return. (a) In November 1838 the agreement between *Bowyer* and the bankrupt was entered into, and from that period the bankrupt ceased to have any equitable interest, and at the most he was only a bare trustee in respect of the shares. On the 13th November notice was given to the bank, and they so far approved of the transfer that, in the following month, they chose Mr. *Bowyer* a director of the company, without any other qualification than

(a) Sec 7 G. 4 c. 45. s. 6.

that which holding the shares in question would confer; and in fact and in equity, if not at law, the bankrupt from that time, if not sooner, ceased to have any interest whatever, direct or indirect, in the copartnership, and had ceased to be a partner. [Sir George Rose:—You ought to have taken the precaution of procuring a correct return to be made (a), and therefore it is rather ungracious in you to contest the truth of that in which the bankrupt's name appears as shareholder. The question is, whether the bankrupt did not continue a partner till divested of the legal estate,—not as between him and his copartners, but as between him and the world,—and liable to all the partnership transactions till his legal title was gone?] We contend that the equitable title being in *Bowyer*, the legal title was also in him, from the date of the agreement by relation back from the time when the transfer was finally executed.

Mr. *Russell*, in reply, was stopped by the Court.

Sir *John Cross*:—We have no evidence of the actual date of the indorsement of these bills. From the return, and from the admission of the respondents, it appears that *Phillips* was a partner in this bank on the 13th November. They who say that he subsequently ceased to be a partner have the *onus probandi* cast upon them, and, if they fail in proving the cessation, we must take it as existing until the actual execution of the deed of transfer. I do not think they have proved that the bankrupt ceased to be a partner prior to that time. But if the assignees think it material they may take an inquiry when the bills were indorsed to the petitioners, of which we have no evidence; and if that be proved to be subsequent to the transfer then of course the bankrupt's estate would not be liable.

1839.

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Ex parte
Prescott
and others.
In the matter
of
Phillips.

(a) See 7 G. 4. c. 46. s. 8.

1839.

Ex parte
PRESCOTT
 and others.
 In the matter
 of
PHILLIPS.

Sir *George Rose* :—

There must be an inquiry as to the time when these bills were indorsed to the petitioners; that is indispensably necessary. There is a great difference between partners as to the world, and partners *inter se*. If we were now trying an action, the proof before us would be conclusive. The whole question is, whether there is evidence to satisfy us that, at the time when the petitioners took the bills, the bankrupt appeared to the world as a partner in the bank. The formality of a deed of transfer was not necessary to divest the bankrupt of his liability; but, by the sense of the 6th and 8th sections of the act, the return is evidence that the parties named therein are partners till, by a subsequent return under the latter section, a change of members shall be notified to the world, or at all events till, by some other notorious act, that liability is legally divested. Here the parties resort to a deed for that purpose, and there is no evidence to the world of the cessation of liability, till the deed of transfer was subsequently executed. By the evidence coming from the assignees themselves, I think it is conclusive that the agreement that *Bowyer* should take the shares was executory only until the execution of that deed, else why was it subsequently executed.

If this were a mere question between the assignees and the petitioners, any inquiry would, I think, be idle; for there is no object in retaining this proof, except as a guard over the certificate; but in that the bankrupt also is concerned.

An inquiry was directed to Mr *Gregg*, to ascertain when and how the bankrupt ceased to be a partner, and when the bills in question were indorsed, or came to the hands of the petitioners; and the petition was ordered to stand over.

The report of the deputy registrar found that the bills were indorsed on the 19th February, and that the deed of transfer was not executed till the 9th March; whereupon the proof for the amount to be found due was ordered to be admitted. (a)

1839.

Ex parte
PRESOTT
and others.
In the matter
of
PHILLIPS.
Nov. 20.

Ex parte THOMAS MAY.—In the matter of
THOMAS MAY.

C. of R.
Nov. 12,
1839.

THIS was a petition praying that *G. Hawtayne* and *John Rees* might be ordered to produce and bring in a fiat, and cause it to be entered of record by the proper officer of the inrolment office, and that when so entered the officer might attend at the trial of an action; and for costs. And it stated, that in October 1838 the fiat in question issued against the petitioner, at the suit of the above *G. Hawtayne* and *John Rees*, as assignees of *J. Malachy*; in November following the fiat was annulled for want of prosecution: that, feeling himself aggrieved thereby, the petitioner had commenced an action against them for maliciously suing out the fiat: that the fiat not having been enrolled, he had given notice to the above parties and their solicitor, requiring them to enrol the proceedings for the purposes of the action, the petitioner offering to pay the expense, and that in the event of their neglecting to do so a petition would be presented to this Court.

Proceedings under a superseded fiat ordered to be enrolled at the instance of the bankrupt, in order to bring an action. (b) Costs against the respondents, in consequence of previous application and refusal to enrol. *Quare*, as to the lien of a solicitor upon a superseded fiat.

(a) See *Harvey v. Kay*, 9 B. & C. 356. c. 16. s. 96., application to the Lord Chancellor was, and (by the

(b) Courts of common law have no power to order assignees to enrol proceedings so as to make them evidence. Under 6 G. 4. 1 & 2 W. 4. c. 56.) to the Court of Review is necessary. *Johnson v. Gillet*, 2 Moo & P. 8; 5 Bing. 5.

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Mr. Russell and Mr. Anderdon for the petition :—

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 In the matter
 of
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By the 2 & 3 Will. 4. c. 114. s. 8. it is provided, "that no fiat issued or to be issued in lieu of a commission of bankrupt, whether prosecuted in the Court of Bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity unless the same shall have been first entered of record in the Court of Bankruptcy as aforesaid."

In *ex parte Johnstone, re Stevens (a)*, it was held, that in order to have the proceedings enrolled under the 6 Geo. 4. c. 16. s. 96. at the instance of third parties a petition was necessary; and it being supposed that that section (*b*) did not extend to fiats, a provision was made

(a) *Mont. & M. 82.*

(b) "And be it enacted, That in all commissions issued after this act shall have taken effect no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid; and the person so appointed to enter matters of record as aforesaid shall be entitled to receive for such entry of every such commission, adjudication of bankruptcy, assignment, or order for vacating the same respectively, having the certificate of such entry indorsed thereon respectively, the fee of two shillings

each, and for the entry of every certificate of conformity, having the like certificate indorsed thereon, six shillings; and every such instrument shall be so entered of record upon the application of or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy to be entered of record as aforesaid, and also appoint such fee and reward for the labour therein of the person so appointed as aforesaid, as the Lord Chancellor shall think reasonable; and all persons shall be at liberty to search for any of the

for it in the 5th section (a) of the 2 & 3 Will. 4. c. 114. [Sir George Rose:—In *ex parte Johnstone* the commission was not a superseded commission. That makes a considerable difference. The solicitor may have a lien upon a superseded fiat which *might* give him a right to resist the enrolment, though he could not have any such lien upon a valid fiat.] There is no attempt to set up any such claim in the present case, but were it otherwise, the solicitor could have no lien which could interfere with the right of third persons to bring actions. (b)

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Ex parte
MAY.
In the matter
of
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matters so entered of record as aforesaid: Provided that on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon, purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid." — 6 G. 4. c. 16. s. 96.

(a) "And be it further enacted, That all fiats already issued or hereafter to be issued in lieu of commissions of bankrupt to be prosecuted elsewhere than in the said Court of Bankruptcy, and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners, and all appointments of assignees, and certificates of conformity, made and allowed under such fiats, may and shall be entered of record in the said Court of Bankruptcy, upon the application of

or on behalf of any party interested therein, on the payment of the fees hereafter mentioned, without any petition in writing presented for that purpose; and that any one of the judges of the said court may, upon petition, direct any deposition or other proceeding under such fiat to be entered of record as aforesaid." — 2 & 3 W. 4. c. 114. s. 5.

(b) Whenever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor, though the latter may have a lien on it for costs against his client; *Furlong v. Howard*, 2 Sch. & Lef. 115; *Merrewether v. Mellish*, 13 Ves. 161. As to solicitor's lien extending generally to prevent the production of papers or deeds of his client, see *Baker v. Henderson*, 4 Sim. 27; *Steele v. Scott*, 2 Hogan, 141; *Hodgens v. Kelly*, 1 Hog. 388; *Moir v. Mudie*, 1 Sim. & S. 282; *Colegrave v. Manley*, Turn. & Russ. 400; *Brassington v. Brassington*, 1 S. & S. 455; *Balch v.*

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 MAY.
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 of
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Under the 2 & 3 Will. 4. c. 114. s. 8. no action can be brought unless the proceedings be first enrolled. For this purpose, therefore, production is absolutely necessary; because a fiat has been annulled it is no less a fiat; for a procedendo might be ordered, and the Court has still jurisdiction over it.

Mr. *Swanston* and Mr. *Bethell* *contrd*:—From the words of the 6 Geo. 4. c. 16. s. 96. it is evident the intention of the legislature was that that section should be confined in its operation to existing fiats. The Court has no jurisdiction to make the order; the fiat in question has gone from this Court, and has now become like any other deed over which a solicitor may have a lien.

Mr. *Russell* in reply was stopped by the Court.

Sir *John Cross*:—It is very true that a solicitor might, as between himself and the assignees who employed him,

Syms, Turn. & R. 87; *Tyler v. Drayton*, 2 Sim. & S. 309; *Clutton v. Pardon*, Turn. & R. 304; *Mayne v. Hawkey*, 3 Swan. 93; *Lord v. Wormleighton*, 1 Jac. 580.

Whether the proceedings under a commission of bankruptcy that has been superseded are subject to the solicitor's lien was mooted in *ex parte Shaw*, Jac. 270; S. C. 1 Gl. & J. 124. That was a petition by the petitioning creditor and the provisional assignee under the existing commission, who had been assignee under the superseded commission, praying that the solicitors under the superseded commission

might deliver up the proceedings; and Lord *Eldon* said, "Whether the assignees might be compelled to deliver them up I cannot be called upon to decide on the present petition; but, if an order issued against the assignees, and the solicitor refused to deliver the proceedings unless his bill of costs were paid, I do not think the Court would make any order on the solicitor. If, upon a petition against the assignees, the Court would order them to bring in or deliver up the proceedings, and the assignees could not comply with that order but by paying the solicitor's bill, it must be paid."

have a lien on a superseded fiat, but he could not use it as a means of hindering the course of justice. In this case the bankrupt complains that this fiat has been superseded, but has not been duly enrolled according to the 2 & 3 Will. 4. c. 110. s. 5. He has brought an action against the respondents, who issued that commission, and tells us that he must fail in that action unless that which he now asks is granted, and he is quite correct in the view he takes of such consequences by reason of the 8th section of the same act. It is very evident, therefore, that the ends of justice cannot be obtained unless we grant this petition. On the other hand, the respondents make out no case whatever of any injury which can befall them if these proceedings are enrolled, except this, that it will be the means of affording evidence against them on the trial of the pending action;—to such an objection we cannot listen for a moment. It is quite clear our jurisdiction is not ended by the supersedeas. (a) We have still a control over the proceedings, and this is a very fit and proper case wherein we should exercise our jurisdiction. This petition must therefore be granted; and as application was made in the first instance to the respondents and their solicitor, and they refused to comply with it, the respondents must pay the costs of the application.

Sir George Rose:—The only doubt I entertained was, whether the petitioner ought not to have got an order for enrolment in the first instance, *ex parte*, and then have come back here on the refusal of the respondents to comply. But in consequence of the application made

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Ex parte
Max.
In the matter
of
Max.

(a) *Ex parte Fector, Buck*, 428; *ex parte Shaw, Jac.* 270; S.C. 1 *G. & J.* 124; *ex parte Warren*, 1 *Rose*, 277; *ex parte Thomas*, 3 *Dea. & Ch.* 292.

1839. previous to filing this petition, and the refusal already given, the order must go with costs.

Ex parte
MAY.
In the matter
of
MAY.

Ordered as prayed, with costs against the respondents. (a)

C. of R.
Nov. 21,
1839.

Ex parte MARY ANNE SHAW.—In the matter of EBENEZER KIRKBY, J. KIRKBY, J. GREGORY, and W. K. GREGORY.

Where proof of debt has been tendered by affidavit, and commissioners are not satisfied, but require creditor to attend for examination, although she be very infirm and old, and unable to travel, all this Court can do is to give a commission in aid to take examination at creditor's own residence.

THIS was a petition praying liberty to prove 1,034*l.* against the estate of the bankrupts. In May 1832 the petitioner lent 850*l.* to the bankrupts, for which they gave their joint and several bond. The bond was sued upon, and, at the sittings after Hilary Term 1839, the petitioner obtained a verdict; and the above sum, 1,034*l.*, became due to her, for principal, interest, and costs, for which, in March 1839, execution issued. Soon after the fiat issued, and was now working at Sheffield. On the 30th April the petitioner's solicitor attended to prove the debt by affidavit, but the assignees alleging that it was affected by usury, the commissioners refused to receive such proof, and ordered that the petitioner should be brought to Sheffield, in order to be examined as to the debt. The petitioner was upwards of seventy-nine

a There seems some little misconception as to the necessity of enrolling *depositions*. Applications for this purpose at the bankrupt office have been very common of late. But it is as well here to intimate that there is no necessity for such a proceeding. Depositions are evidence in certain circumstances only, and the enrolment or non-enrolment can in no wise, in the least degree, add to or diminish that quality. The 6 G. 4. c. 16. s. 96. and 2 & 3 W. 4. c. 114. s. 5. refer only to four things, viz. the commission or fiat, the adjudication, the assignment to assignees under old commissions, or the appointment of assignees under fiats, since 1 & 2 W. 4. c. 56., and certificates of conformity.

years of age, and in a very infirm and bad state of health. She resided at Elvaston near Derby, a distance of forty miles from Sheffield.

Mr. *Swanston* and Mr. *K. Parker* for the petitioner:—There seems no ground whatever for the objection raised by the assignees, and under the circumstances of the infirmity of the petitioner, and her total inability to travel, we trust the Court will at once direct the proof to be admitted, or, at all events, that the Court will direct some mode of taking her examination without putting her life in jeopardy, by obliging her to travel from her residence to Sheffield.

Per Curiam:—We have no jurisdiction whatever, because the commissioners do not appear to have rejected the proof; all they have done is to postpone it. But if it were worth while you might have a commission in aid to take her examination at her own residence. All we can do is to order the petition to stand over, to afford her any reasonable time to attend at Sheffield for her examination.

Petition to stand over.

Ex parte JOHN BRADBURY, ADOLPHUS CHERRELL, and THOMAS EDGLEY.—In the matter of THOMAS BLADES WALDEN.

C. of R.
Nov. 23,
1839.

THIS was a petition seeking to expunge a proof for 2,233*l.* 6*s.* 6*d.*, made on behalf of *John Anthony Hermon*

A., a creditor of *B.* and *C.*, gives *D.* a general power of attorney for the management of

his affairs, dated 4th July 1834, under which *D.* consents to an arrangement between *B.* and *C.*, on the dissolution of their partnership, that *C.* should become solely responsible for *A.*'s debt. That being still unpaid, *C.* becomes bankrupt, *B.* remaining solvent; and *D.* proves the debt against the separate estate of *C.* After the fiat *A.* is found to have been lunatic since 1st of July 1834. On petition to expunge, on the ground that *D.*'s adoption of *C.* as sole debtor was under a void power, and without authority, and that *B.* remained solvent, and therefore liable,—Held, that the proof was properly made. Lunacy is not, *per se*, a revocation of power of attorney.

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Ex parte
SHAW.
In the matter
of
KIRKBY
and others.

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Ex parte
BRADBURY
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against the separate estate of the bankrupt. The fiat issued on the 11th September 1837; and the petitioner, *Richard Hermon*, representing himself to be the committee of *John Anthony Hermon* a lunatic, had been admitted to prove the above debt as due from the bankrupt alone to *J. A. Hermon*. The proof was made under the following allegations:— Prior to 1832 the bankrupt married the daughter of *J. A. Hermon*, and shortly afterwards entered into partnership with one *William Bright*, in the trade of drapers, at Liverpool, under the firm of *Walden and Bright*; and *J. A. Hermon* at various times lent and advanced various sums to the firm for the use of the copartnership, for which the firm gave the following promissory note:—

“ Liverpool, 5th October 1832.

“ £1,750 6 6.

“ We promise to pay, on demand, to *John Anthony Hermon Esq.* the sum of seventeen hundred and fifty pounds six shillings and sixpence, for value received, bearing interest at the rate of five per cent. per annum.

(Signed) “ *Walden and Bright.*”

An account was settled between *Walden and Bright* and *J. A. Hermon* some time after the date of the promissory note, by which it appeared that a balance of 2,946*l.* 6*s.* was due from them to him, including the promissory note; and on the 31st August 1835 the amount of interest then due was paid by the firm to *Richard Hermon*, as the attorney and on behalf of *J. A. Hermon*. In February 1836 *Walden and Bright* compounded with their creditors, by payment of a composition of 15*s.* in the pound, and *J. A. Hermon* agreed to accept the said composition, and not to require payment of it till all other creditors had been paid. An agreement was signed on that occasion between the bankrupt and *Richard Hermon* on behalf of *J. A. Hermon*, as follows:—

" Sir,

6th February 1836.

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" If you will sign the agreement on the part of your brother, *J. A. Hermon*, between *William Bright* and myself and our creditors, by which it is proposed that our creditors (except the said *J. A. Hermon*) shall accept a composition of 15*s.* in the pound on their respective debts, payable three, six, and nine months, and secured by our notes, and that *J. A. Hermon* shall accept the like composition upon the debt due to him, amounting to 2,946*l.* 6*s.*, but not to require payment of any part of such composition until the compositions to all the other creditors are paid, I hereby engage to indemnify and hold you harmless for so doing; and I do also agree to allow and set off so much of the said debt due to the said *J. A. Hermon* as shall be remaining due and unpaid at the time of his death, together with any loss of interest by reason of the said composition in the meantime, out of and against any legacy or share of his property payable to me or my wife under the will of the said *J. A. Hermon*. Dated this 6th February 1836."

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BRADBURY
and others.
In the matter
of
WALDEN.

In June 1836 *Walden* and *Bright* made out and settled another interest account with *J. A. Hermon*, showing 128*l.* 17*s.* 7*d.* to have been paid for interest up to that period. *Walden* and *Bright* dissolved partnership on the 25th June 1836, and it was alleged by *Richard Hermon* that on that occasion it was agreed between *Walden* and *Bright* that *Walden* should continue to carry on the business, and take the stock, and receive and pay all debts due and owing to and by the firm, and indemnify *William Bright*, and should pay him 800*l.* by annual instalments for his share of the business; 2,209*l.* 14*s.* 6*d.* was then due to *J. A. Hermon*, which, with interest, made up the sum proved. At the time of the dissolution, *J. A. Hermon* agreed to re-

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lease *Bright*, and adopted the bankrupt as his sole debtor, and thereby became his separate creditor. The assignees opposed the proof, on the ground that it was a joint, and not a separate debt, and that *Bright* was still solvent.

A commission of lunacy issued against *J. A. Hermon* on the 23d November 1837, under which he was found to have been lunatic from the 1st July 1834, and therefore the petitioners contended, that the acceptance of the bankrupt as his separate creditor by *J. A. Hermon* was void.

It appeared that *Richard Hermon* acted under a power of attorney, dated the 4th July 1834.

Mr. *Bethell* for the petition:—The proof against the separate estate of *Walden* must be expunged. It was a joint debt, and to convert it into a separate debt the consent of the creditor was requisite; but the creditor having by the commission of lunacy been found a lunatic prior and subsequent to the alleged agreement to convert it into a separate debt, and it being manifest he was not then in a fit state to consent to such conversion (*a*), it remains as it was, a joint debt, and therefore not provable as a separate debt against this bankrupt so long as there is a solvent partner in existence; and the solvency of *Bright*, the other partner, is not denied. It is a principle, that as long as a solvent partner remains liable no proof can be made against the separate estate of his bankrupt copartner; and even supposing the lunatic to have assented to the conversion, still this proof cannot stand; for in *Lodge v. Dicus* (*b*) where, on the dissolution of a partnership, it was agreed between two partners, *A.* and *B.*, that *A.* should take upon himself to discharge a debt due to the

(*a*) See *Ashby v. Palmer*, 1 Mer. 296.

(*b*) 3 B. & A. 611.

plaintiff, who was informed of the arrangement, and expressly agreed to exonerate the other partner, *B.*, it was held that such arrangement was no defence to an action, the debt not being satisfied by *A.* accordingly. [Sir George Rose: — “ Unless a fresh security were given,” that decision adds.]—The case of *David v. Ellice* (a) is still stronger; and there, though the creditor assented to the change of debtors, and might have drawn for the debt during the solvency of the new debtors, the retired partner was held nevertheless liable.

Mr. *Swanston* and Mr. *Bacon* for the respondent *Richard Hermon*, as committee of *J. A. Hermon*:—The cases cited, and more recent decisions, show that if the creditor has done any substantive act, such as taking fresh security, so as clearly to recognize the substituted debtor as the only party to whom he looks for payment of his debt, the original co-debtor is discharged. (b) But it is said, that having been found a lunatic at the time of the dissolution and adoption of this bankrupt as his debtor, Mr. *Hermon* was incompetent to assent to such arrangement; but that is not so; acts overreached by lunacy are not always set aside, the inquiry being, whether they were fair and reasonable, and whether for the lunatic's benefit, and if the facts warrant that conclusion they are always upheld. (c) It is rather a question addressed to the discretion of the Court, the finding of the jury not being conclusive. (d)

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Ex parte
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(a) 7 D. & R. 690; 5 B. & C. 411. This principle was maintained in *Price v. Berrington*, 196; 1 Car. & P. 368.

(b) *Thompson v. Percival*, 3 Nev. M.R., 1st July 1840, and an issue was directed to ascertain if the party found lunatic was such *de facto* at the time of the act sought to be set aside.

(c) See *Niell v. Morley*, 9 Ves. 478.

(d) *Sergison v. Sealey*, 2 Atk.

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Ex parte
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Here also the present respondent was acting under a power given him by the lunatic, and it is by no means clear that lunacy is a revocation of that power. In *Bell's* commentaries of the law of Scotland (a), speaking of general powers of attorney to manage the affairs of the party empowering, it is said, "to the recall of such a power, two things are necessary; first, the will and intention to recall; and, secondly, special notice or general notoriety."

It then speaks of death and bankruptcy being a revocation of such power, and continues—"Insanity is to be judged of differently. There is here neither an implied natural termination to the authority, nor is there an existing will to recall the former appointment; nor is the act notorious by which the public may be aware of such failure of capacity." "But the strong practical ground of good sense on which this question was disposed of as relative to the public was, that insanity is contradistinguished from death by the want of notoriety; that all general delegations of power on which a credit is once raised with the trading world subsist in force to bind the grantor till recalled by some public act or individual notice; and that while they continue in uninterrupted operation, relied on by the public, they are in law to be held as available generally, leaving particular cases to be distinguished by special circumstances of *mala fides*. The question does not appear to have occurred in England, but the opinion of very eminent English counsel was taken on the case which was tried in Scotland, and they held the acts of the procurator to be effectual to the public against the estate of the person by whom the procuratory was

(a) Vol. 2. p. 320.

granted;" and the commentator adds by way of note, that the question was put thus, "whether in these circumstances (a general power to transact business) the transactions of the attorney under the procuration 'are good to those who transacted with him from the date of it to the period of stopping.' The answer by Sir *V. Gibbs*, Sir *S. Romilly*, and Mr. *Adams* was, 'we think they are good.'" In the case now before the Court, what Mr. *R. Hermon* did under the power in reference to this question was perfectly valid and unimpeachable down to the time of the bankruptcy, and there is no reason why the subsequent finding of insanity should "render nugatory all that was done beneficially to the lunatic."

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Mr. *Bethell* in reply. The commission of lunacy was binding on the committee according to the finding of the jury, and no act done by him, under power or otherwise, which was overreached by the finding, can stand. The quotation from *Bell's Commentaries* supposes a lunacy occurring after the power; but here the power was given after the giver was *de facto* a lunatic, which makes all the difference. In the other cases referred to, there did not exist those difficulties which supervene in the present case. Here the rights of other separate creditors,—always strictly guarded in this court, and giving rise to the most refined distinctions in other cases, — will be affected if this proof is allowed to stand. The next of kin of the lunatic in the event of his death have a right to insist that *Bright's* liability is not discharged, and, *a fortiori*, strangers, viz., other undoubted separate creditors, have a claim in this court not to be deprived of their rights. What we contend for is based on an established rule of this court, and established rules ought not to be dispensed with by the

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exercise of a discretion whether a contract be beneficial or otherwise. The whole question turns on this: Was *Bright* discharged from all liability by what took place? We say not; for it would have been incompetent to him to have pleaded a release from a party found a lunatic at the time; and it is quite clear that if a new committee were appointed, and he were to bring an action against *Bright*, *Bright* could not discharge himself by any thing short of payment. The case of *Kirwan v. Kirwan* is also an authority on this part of the case. (a)

Sir *John Cross*:—You only impeach the power of attorney on the ground of the finding of the jury of lunacy extending from a period prior to the contract in question, and thence you say that what passed did not amount to a valid release of *Bright*. You are aware that here is an account signed by *Walden*, in which he acknowledges the debt to be due from him alone to the lunatic. It seems to me there was ample consideration passing between the several parties to the contract; *Walden* receives the full benefit of the partnership effects, and it would be difficult to restore the parties to the same position if we were to set aside the transaction. As to the effect of *Bright's* continuing liability the proper way of looking at it seems to me to be, whether, if *Walden* had remained solvent, and an action for this debt had been commenced against him alone, he could have pleaded the non-joinder of *Bright*. I think not; but as this is a new point I shall take time to consider my final judgment.

Sir *George Rose*:—As I entertain no doubt in this case I may as well dispose of it, as far as I am

(a) 4 Tyrw. 491.

concerned, at once. The finding of the jury is not so fatal to all intermediate acts as to make them absolutely void. We have an undoubted power and discretion to inquire whether such acts as are impugned be beneficial or otherwise to this unfortunate individual. Nor am I aware that Courts have ever gone so far as to set aside contracts beneficial to the lunatic. The parties most competent by nature to protect the lunatic's interest, and to decide whether the act in question was beneficial to him, admit it to be so. The bankrupt is the son-in-law of the lunatic creditor, and the respondent is his brother and committee. The bankrupt has by every means in his power affirmed the contract, and the respondent, by resisting this application, tells us that it is best that the bankrupt alone should be looked to for payment of this debt. As regards the rights of other creditors, how often do we interfere against them in cases of persons lunatic *de facto*, though not found to be such by inquiry of lunacy. It is every day practice to allow another person to prove on behalf of a creditor labouring under such an infirmity, and admit proof by affidavit where in strictness it could only be done by *viva voce* examination; and yet it might as well be said in those cases that the strict legal rights of other creditors are affected. But I apprehend that as a court of equity we are warranted in that course; and if a question of this kind were before the Lord Chancellor I have no doubt he would inquire whether the contract in question were beneficial or otherwise to the lunatic, and upon the result of that inquiry he would expunge or retain this proof. I do not think there is any difficulty rendering such an inquiry necessary in the present case; were it otherwise, as we might perhaps be *encroaching* in some degree on a jurisdiction not properly belonging to us, I

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might hesitate about directing it. Here we find an agreement entered into under power of attorney, which is not at all touched by the finding of the jury. The agreement was good at the time, and no court of equity would have set it aside. If any action had been brought by *Bright*, a court of equity would, upon a bill filed under the circumstances related in this petition, have decreed a release to him pursuant to the agreement by *Richard Hermon* at the time of the dissolution. Where one partner retires, leaving by agreement the other to pay debts, all that the Court requires to give a right of a joint creditor against the separate estate of the remaining partner is, that there should be an assumed consent on the part of the creditor to accept him as his debtor, and to discharge the outgoing partner; and where we find that the act of God prevents the legal and actual assent of the creditor, but that those who have taken upon themselves the management of his affairs have assented to the change of security, that the bankrupt has held himself out as the party solely liable, and that the change of security is beneficial for the lunatic creditor, I think we are bound to assume that a sufficient assent has been given. Such is the present case, and therefore I am of opinion this proof ought to stand.

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Sir *John Cross*.:—The assent of the creditor in this instance to the substitution of his debtor is given by the brother of the lunatic creditor acting under a general power of attorney for the management of his affairs. At the time it was considered to be a perfectly valid power, but the creditor was, after the date of this fiat, declared to have been a lunatic since the 1st of July 1834, the power of attorney being dated 4th July 1834.

It was said that this finding of the Jury is conclusive; but the case of *Sergison v. Sealey* (a) was referred to, in which Lord *Hardwicke* distinctly lays down the contrary proposition. But then it is said, that though it is not conclusive as against strangers, yet it is so upon the committee. I can see no reason for establishing such a doctrine, unsupported as it is by any decision. The commission is tendered as evidence adverse to the respondent, and then we have the fact of the power of attorney existing. We find that under that power of attorney, the attorney exercised a proper judgment, and I therefore see no ground for saying that assent was not given. But then it is contended that there was not so complete a transfer of liability as to discharge *Bright* the retiring partner, and *Lodge v. Dicus*, and *David v. Ellice*, and *Kirwan v. Kirwan* (b) were referred to in support of that proposition. *Kirwan v. Kirwan* (b) turned on the question of fact, whether there was evidence of assent; and the Court, looking at the circumstances as jurymen, considered there was not; and that case shows that the whole question turns on the evidence, and if assent is proved the retiring partner is absolved from liability. But the case of *Thompson v. Percival* (b) is even stronger. There the question was left to the jury, and Lord *Dennan* in his judgment comments upon *Lodge v. Dicus* and *David v. Ellice* thus:—"In the former," he says, "no new negotiable security was given, nor does the difference between the joint liability of two and the separate liability of one appear to have been brought under the consideration of the Court. In the latter no bill of exchange was given; and that decision, on consideration, is not altogether satisfactory to us." In the present case

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(a) 2 *Atk.* 411; and see *Price & Berrington, Supra.*

(b) *Supra.*

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there is abundant consideration, and it is unnecessary to inquire whether the arrangement entered into was beneficial to the lunatic. The question before us is not, be it remembered, whether *Bright* is discharged, but whether the bankrupt has not contracted a new debt by the mode of dealing? I think he has.

Sir *George Rose*:—At the date of the bankruptcy the power of attorney stood unimpeached, the commission of lunacy and finding being subsequent to the fiat. It was thence a good debt at that time, and it would not be right to overrule it in consequence of the subsequent inquisition.

Petition dismissed.

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Part of a petitioning creditor's debt contracted during trading, and part since, not sufficient to support fiat. *Secus*, if part before trading and remainder during its continuance.

In the matter of DOLBY.

THIS was an application to annul the fiat on the ground of no petitioning creditor's debt. The bankrupt had ceased trading. Some time since a part of the petitioning creditor's debt, insufficient to support the fiat, was contracted, while he carried on trade, and the balance, making up "the 100*l.* and upwards," was contracted since the trading ceased.

Mr. *Anderdon* in support of the petition.

Mr. *Ellison* *contrd.*

Per Curiam:—If this fiat were good, then if a debt of 10*s.* had been due during the trading, and the 99*l.* 10*s.* had been contracted since, it would create a sufficient petitioning creditor's debt. There is a great difference between such a case and that where a part had been contracted before the trading and the remainder during the trading.

Fiat annulled.

Ex parte FORRESTER.—In the matter of FORRESTER.

C. of R.
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THIS was a petition to annul for want of an act of bankruptcy.

A year suffered to elapse, and acts of acquiescence before petition to annul by bankrupt presented, Petition dismissed.

Mr. *Swanston* and Mr. *Campbell* for the petition.

Per Curiam :—The fiat issued in November 1838, a year back. Why did you not petition sooner? There are various acts of acquiescence, which, connected with the delay, warrant us in maintaining the fiat.

Petition dismissed without costs.

Ex parte WILLIAM MONK the Bankrupt, and of his sons WILLIAM HENRY MONK and EDWARD VAN HARTHELLS MONK.—In the matter of WILLIAM MONK.

C. of R.
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THIS was a petition to supersede the commission which issued in 1804, to which the bankrupt duly surrendered; and under which he had passed his final account. The assignees were long since dead, and there had been no new choice; debts amounting to 684*l.* 14*s.* 4*d.* were proved, and a dividend of 8*s.* 6*d.* in the pound had been paid out of the assets. All the creditors and their representatives who had proved, and who could be discovered, had agreed to supersede the commission, upon being paid a composition for the residue of the debts from the petitioners, the sons of the bankrupt; but there were other creditors who could not be discovered, the balance of whose debts amounted to 33*l.* 8*s.* 2*d.* It was proposed

Commission as old as 1804, assignees dead, Court will not supersede, on composition to all creditors who could be found, and payment into Court of amount of debts of those who could not, without a new choice of assignees. Proceedings being lost, commissioners to call meeting for choice, &c. upon the footing of a list of debts proved.

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Mr. O. *Anderdon* for the petition cited *ex parte*
Wallis. (a)

Per Curiam :—There is only one mode of effecting the object of this petition ; that is, by calling a meeting for a new choice of assignees, and then proceeding in the regular way under the 6 Geo. 4. c. 16. ss. 133, 134, especially with a commission so old. We cannot otherwise bind those creditors who are not to be found. If the proceedings are lost the commissioner to whom this commission is transferred may proceed upon the list of debts set out in the petition, if he thinks it correct.

Ordered.—Let the commissioner inquire whether any sales have been had under the commission ; and if the proceedings were lost, then the commissioner to be at liberty to proceed on the list of debts, and inquire if any detriment would arise to any person in superseding the old commission, the petitioner undertaking to confirm all sales if the commission be ultimately superseded.

Ex parte EDWARD MARTIN and another.—In the matter of ROBERT GRAHAM.

C. of R.
Nov. 25,
1839.

MR. SWANSTON applied to change the venue of the fiat from Sherborne, Dorsetshire, to London. The petition stated the bankrupt to be a hawker, against whom the petitioners had bespoken a fiat on the 15th November. On the 9th the bankrupt had offered a composition to his creditors of 10s. in the pound, alleging as a ground for such offer that certain of his effects had been seized for breach of the laws relating to the customs; but no sooner had he made the offer than he absconded from his creditors. The petitioner obtained a list of his creditors from the bankrupt's wife, and from the bankrupt's attorney at Taunton, and it appeared that all but one carried on business in London, and that that one was a creditor for 130*l.*, and resided in Ireland.

Bankrupt, a hawker, travelling about the country, neither residing nor trading in any one place particularly, but described in docket papers as of Sherborne, 117 miles from London. All creditors, but one in Ireland, resided in London, and witnesses to support fiat in London. Bankrupt had absconded with effects. Fiat removed from Sherborne to London.

The bankrupt's purchases were almost entirely confined to London. All the creditors believed the alleged cause of the offer of composition to be fictitious, and they were desirous that the fiat should be worked in London, Sherborne being 117 miles distant, and the bankrupt having no settled place of business or of residence. The bankrupt's wife afterwards absconded with all the bankrupt's effects. The witnesses to support the fiat resided in London.

Per Curiam :—Take the order.

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Ex parte JAMES CATCHPOLE.—In the matter of
CHARLES RICKABY.

Insolvency in 1828, commission in 1831, and fiat in 1836, against party, who had paid no dividends under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor under fiat of 1836, that order discharged, and payment of dividend ordered. Costs out of estate. Assignees under commission of 1831 need not have been served with latter petition, but having been served by respondents, the assignees under fiat of 1836, their costs also ordered to be paid out of the estate.

THIS was the petition of a creditor, and, *inter alia*, it stated that a fiat issued against the bankrupt in April 1836, under which assignees and an official assignee had been chosen. The bankrupt had not passed his last examination, and it had been adjourned *sine die*. On the 30th April he was committed to Newgate for concealment of his effects, where he remained till the 24th June, during which period the assignees discovered concealed effects to the value of 1,500*l*. In August 1836 a dividend of 5*s*. had been declared, but payment of it was suspended under the following circumstances:— It appeared that in November 1828 the bankrupt took the benefit of the insolvent act, the debts in his schedule amounting to 2,030*l*. In May 1831 a commission of bankruptcy issued against him under which debts to the amount of 22*l*. were proved, the petitioning creditor therein having been imprisoned two years by the commissioners of insolvency, having been twice a bankrupt and four times an insolvent. No dividends were paid under either of those processes against the present bankrupt, nor had he obtained his certificate. By an order under the present fiat of 1836, dated 31st August 1836, payment of the above dividend was stayed until further order of this Court, on the petition of the official and creditors' assignees under that fiat, praying that it might be stayed until all questions between the creditors under the insolvency and under the commission of 1831, and the assignees of the fiat of 1836, should have been settled and determined by judicial authority. Three years having elapsed, and no proceedings whatever having been taken by any one interested under the

insolvency or commission of 1831 to claim or prevent the payment of the funds received or dividend declared under the fiat of 1836, this petition prayed that the order staying the payment of the dividend might be discharged, and the dividend paid, and for costs out of the bankrupt's estate, not disturbing the dividend declared.

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Mr. *Swanston* for the petition.

Mr. *Anderdon* appeared to consent on behalf of the assignees under the fiat of 1836.

Mr. *Montague*, for the assignees under the commission of 1831, and Mr. *Bacon*, for the official assignee under the *commission*, also consented.

The Court made the order as prayed, and the only question was as to the costs.

Mr. *Swanston* :—The assignees and official assignee under the commission of 1831 need not have appeared. They were not served by the petitioner.

Mr. *Montagu* :—But they were served by the assignees under the fiat of 1836.

Per Curiam :—That is sufficient to entitle them to costs out of the estate.

Ordered, and costs of all parties out of the estate.

C. of R.
Nov. 25,
1839.

Ex parte CHARLES WHIBLEY and another.—In the matter of ANTHONY ATKINSON.

Order made, *nunc pro tunc*, to dispense with attendance of petitioning creditor at opening of fiat.

THIS was an application for an order *nunc pro tunc*, that the petitioning creditor's attendance at the opening of the fiat might be dispensed with. The commissioners had admitted the requisite proofs upon the petitioning creditor's affidavit without the order of this Court, through inadvertence.

Mr. Bickner in support of the application.

Per Curiam :—Take the order. (a)

C. of R.
Jan. 13,
1840.

Ex parte WILLIAM LYCETT and another.—In the matter of THOMAS WILD.

L. C.
Jan. 16,
1840.

Application to change venue of fiat from Cheltenham to London; 2 creditors, debts equal to 1,060*l.*, at Cheltenham; 22 debts, equal to 2,700*l.*, in London; 1 debt, equal to 2,628*l.*, at Bedford; 13 debts, equal to 700*l.*, in the north. Witnesses, &c. in London. Petition refused by Court of Review, but granted by Lord Chancellor.

THIS was an application by the petitioning creditor to change the venue of a fiat from Cheltenham to London, and the petition stated that, "as the petitioners were informed and believed," the debts of the bankrupt, who was a draper at Cheltenham, were 6,930*l.*, only two of the creditors, whose debts amounted to 1,060*l.*, resided at or near Cheltenham; that twenty-two creditors, whose debts amounted to 2,700*l.*, resided in London; that one creditor, whose debt was 2,628*l.*, resided at Bedford; and that the other creditors, thirteen in number, and whose debts amounted to about 700*l.*, principally resided in the counties of Nottingham, Warwick, Stafford, and

(a) In *ex parte Cromwell*, in *re Young or Nunn*, on the 1st May 1840, a similar slip had happened. Upon other grounds, together with that objection, a petition was presented to supersede this fiat, and for want, *inter alia*, of trading, it was granted. The fiat having been annulled accordingly, on the 8th May following Mr. Russell applied for an order *nunc pro tunc* to dispense with the attendance; but the Court refused to interfere.

Lancaster. All the witnesses to support the fiat resided in London.

Mr. *Randall* for the petition.

Per Curiam :—No order.

Mr. *Randall* this day applied to the Lord Chancellor, on an original petition, stating the above facts, and the former application and refusal by the Court of Review; and

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The Lord Chancellor granted the order as prayed.

Ex parte GEORGE POLLARD.—In the matter of
THOMAS COURTNEY. (a)

C. of R.
May 2,
1840.

THE facts of this case will be seen, *ante*, p. 239.

The terms of the Lord Chancellor's order, dated 20th January 1840, were as follows:—"Declare that the petitioner is entitled to stand as equitable mortgagee on the premises in the special case mentioned (*ante*, p. 239), and to have a preferable claim for such debt as the said Court of Review may upon investigation find to be due to him upon the securities in the said (special) case mentioned; and I do refer the case back to the said Court of Review." Subsequent to the presentation of the petition of appeal on the special case, by arrangement between the parties, the property was sold, and it was agreed that the proceeds should be invested, to abide the result of the appeal, without prejudice to either party, and the assignees deposited the produce in the bank of the British Linen Company in Scotland.

The petitioner applied often for an account of the proceeds, but without success.

Where, from a judgment of the Lord Chancellor on a special case, leave had been given to appeal to the House of Lords three months back, and no steps had been taken towards prosecuting the appeal, and no application made to stay proceedings, *quære*, whether the Court of Review is justified in refusing to make directions consequential on the Lord Chancellor's judgment?

Party obtaining leave to appeal ordered to elect within a given time whether he would proceed with it or not.

(a) See this case on the original hearing in the Court of Review, 3 *Mont. & Ayr.* 340, and on the special case to the Lord Chancellor, *ante*, 239.

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Upon the *ex parte* application to the Lord Chancellor for leave to appeal to the House of Lords, on the 14th February 1840 (*a*), the order made was as follows:—"Now upon hearing what was alleged in support of the said application, and deeming the matter brought before me by way of appeal from the Court of Review to be of sufficient importance (*b*) to require the decision of the House of Lords, I do hereby grant such permission to appeal, and do direct the whole facts (*c*) whereupon the question arose, to be stated in the form of a petition of appeal to the House of Lords."

In one of the letters, written since leave to appeal was granted, from the solicitor of the assignees to the petitioner's solicitor, after alluding to taking advice of counsel on this subject, were the following expressions:—"If he should think the assignees not justified in appealing, I shall then advise them to arrange with your client at once," &c.; and in another he said, "Until the assignees have made up their minds whether they will or not appeal from the judgment of the Lord Chancellor, I have not thought myself justified in formally giving you answers to all your questions."

No application having been made to stay the proceedings during the appeal, the petitioner prayed that the proceeds of the property in question might be paid over to him, and that he might be declared entitled to the intermediate rents and profits, the petitioner submitting to have a proof he had made expunged, and to refund the dividends he had received.

(*a*) *Ante*, p. 255.

(*b*) See the words of the 1 & 2 W. 4. c. 56. s. 37. *ante*, p. 253, note.

(*c*) See *ante*, p. 255. The Lord

Chancellor there said, it must go to the House of Lords in the same shape as it came before him, the Lord Chancellor, viz. on the special case.

The Lord Chancellor's order, made on the 20th January 1840, was not delivered out until the 15th February, i. e. after the liberty to appeal was given. It did not appear that any steps had been taken in the way of an appeal, or that any meeting of creditors had been convened to determine whether it should be proceeded with; but the assignees were waiting, before they made up their minds, till they had obtained the opinions of Scotch lawyers and the assent of certain creditors.

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Mr. *Swanston* and Mr. *O. Anderdon* in support of the petition :—

It is very true that the Lord Chancellor has given the respondents leave to carry this question by appeal to the House of Lords; and they will no doubt contend on the other side that this Court ought not to make the order we now ask, because they intend to appeal. But the bare liberty to appeal does not operate as a stay of proceedings. When the respondents obtained leave to appeal, what they ought to have done was, to have added to their application a prayer that all further proceedings should be stayed in the meantime. This, however, they did not apply for, because they well knew that such was the strength of the Lord Chancellor's opinion in our favour that it would have been refused.

When the Lord Chancellor gave his judgment, application for leave to appeal was made, and refused (a); and on the subsequent occasion, when an *ex parte* application was pressed upon him, he granted it, not because

(a) See the report, *ante*, p. 253. It was said upon this occasion, that the Lord Chancellor did not then refuse to give leave to ap-
peal, but stated that a distinct application must be made for the purpose.

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he doubted his own judgment, but because he considered it an invidious office for a judge to refuse leave to appeal from his own judgment. And it is a very strong circumstance, that it was not till after that liberty to appeal, that the order of his Lordship directing this Court to proceed in the matter was delivered out by his officer, which that careful judge would not have done had he thought it would be right that our proceeding upon that order should be stayed. In no court, it is well known, does the pendency of an appeal stay the prosecution of the order, judgment, or decree appealed from (*a*); and unless an order for that purpose be expressly made proceedings must go on in the usual course. Even now, why do not the respondents obtain an express order from the Lord Chancellor to stay proceedings? But they will not. In this state of things, why should we be debarred of our legal right? The judgment of the Lord Chancellor, overruling the opinion of this Court, has declared us to be equitable mortgagees of this property. In the meantime, the property so declared to belong to us has been sold, and the produce is in the hands of the assignees.

Sir *George Rose* :—There can be no doubt the more regular course would have been to have made an application to the Lord Chancellor for a stay of proceedings at the time when the leave to appeal was granted. Yet although the pendency of the appeal without such order is no stay of proceedings, how it should operate upon our judgments in making any order upon this petition is a very different matter.

(*a*) See the cases on this subject,—*Chit. Eq. Index, Practice; Appeal*, IV. 7. p. 1142. 2d ed.

Mr. *Russell*, for the respondents, the assignees :—We admit that the pendency of an appeal does not, *per se*, stay any proceedings in equity. But at common law the Court will remember that a writ of error brought will so operate. So does an appeal from the Court of Session in Scotland. We do not seek to stay the execution of any existing order, but rather to prevent any fresh order being made, which, in the event of the House of Lords deciding in our favour, would be worse than useless, and might be highly prejudicial to the estate, in taking from it funds to which it may ultimately be found to have been entitled. If instead of this petition being granted the Court make no order, there the matter will rest till the judgment of the House of Lords is given ; and no prejudice can happen to the petitioner except delay, which by investment of the property in the meantime can be easily compensated. It would not have been proper for us to have applied to the Lord Chancellor to stay proceedings ; if we had, we should only have been told, what is very manifest, that he had no jurisdiction. All the Lord Chancellor could do, besides giving leave to appeal, was to refer the original petition back to this Court to make directions consequential upon his giving judgment in favour of the petitioner. With respect to the delay that has taken place, that is accounted for in two ways ; first, as assignees we have been very desirous of, and have been waiting for, the consent of all the creditors, that the appeal should be prosecuted ; secondly, this is the first instance, since the establishment of this Court, of an appeal going to the House of Lords, and there are great doubts and difficulties as to our mode of proceeding, arising from the standing orders of the House never having provided for an appeal from the Lord Chancellor sitting in bankruptcy. Those orders apply to appeals from courts of law and from decrees of

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courts of equity. But the order of the Lord Chancellor sitting in bankruptcy is not a decree of a court of equity nor a judgment at law; and therefore no provision is made for it. (a) We are also waiting to obtain the opinions of eminent Scotch lawyers, but at the same time have an honest intention to prosecute the appeal, if we can see our way clearly.

Mr. *Swanston* in reply:—There being no order to stay proceedings, the position is simply this, that the Lord Chancellor has made an order upon this Court directing it to proceed in giving consequential directions following out his order that we are entitled to stand as equitable mortgagees. He would have stayed that order had he thought it right; and all the assignees say in excuse for a delay of three months in prosecuting the appeal is, not that they have a *bond fide* intention to prosecute it, but that they so intend in the event of certain contingences happening. The petitioner has already been kept out of his money three years, and no greater injury ought to be inflicted upon him, except on more potent reasons.

(a) "Die Sabbati, 13 Julii 1678. a decree made whilst the parliament is actually sitting; in which case the party who shall find himself aggrieved may bring his petition of appeal, provided he present it to this House within fourteen days after such decree is made and entered in any court of equity in England or Wales, twenty days in any of the courts in Scotland, and forty days in any of the courts of equity in Ireland."

Sir *John Cross* :—Let it be distinctly understood that the order of the Lord Chancellor is not an order upon this Court binding it to do more, even granting it to have that force, than to proceed to hear the application, and make such order as we think right. This petition comes on as though it had never been heard before. But the assignees step in and say, “ Here is an appeal pending ; the Court can make no order ;” and they refer to the practice of courts of law with regard to writs of error. But I never heard of any instance of a court of law staying proceedings because an intention of issuing a writ of error existed in the mind of a defeated suitor. Such however is the present case: for no appeal is actually pending. Leave to appeal is obtained, but as far as we can learn no single step has been taken towards presenting a petition of appeal. All the assignees venture now to say is, that they intend to appeal, if the creditors will give their assent. Three months have already elapsed, and their minds are not yet made up, and we know not how long they may require for that purpose. The petitioner, a merchant, has been kept out of his property (for such the Lord Chancellor has now declared it to be) three years ; and in my opinion, before we exercise that discretion which the assignees contend for, we should require them to show there would be risk and danger to the estate in our handing over this money to the petitioner. If the assignees take a right view of the difficulties arising out of the standing orders of the House of Lords, it appears to me that they have allowed the time for appealing to pass by altogether ; and otherwise by treating the judgment of the Lord Chancellor in bankruptcy as not being a decree of a court of equity, and so not provided for by those orders, there is no knowing how long it may be before the appeal is prosecuted. There are, therefore, three questions for us

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1840. to consider; first, whether the obtaining leave to appeal is, *per se*, a stay of proceedings; I think we are all agreed as to that, that it is not; secondly, whether there is a *bond fide* intention to prosecute the appeal; and, thirdly, whether sufficient time has not been given already. As to the second point, I should like to see that some substantive step has been taken, whence I could collect such an intention, and I feel very doubtful about its existence; and as to the third point, three months have already elapsed, and nothing has been done—nothing but mere promise, or rather a mere vague statement, that if the consent of creditors can be obtained it is the wish of the assignees to prosecute it; the execution of which wish also seems to depend on the further contingency of the opinions of Scotch lawyers being favourable to the views of the assignees. Upon these points I doubt very much whether we ought not to make the order as prayed.

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 COURTNEY.

Sir G. Rose:—If that which the assignees now seek were to be dealt with and pressed adversely, I have no hesitation in saying that the proper course would have been for them to have applied to the Lord Chancellor to stay all proceedings consequent upon his order during the pendency of the appeal, and he would then have limited the parties to prosecuting the appeal within due course of time. But it comes here as a suggestion of the assignees, standing in the relation of trustees for the body of creditors, that this Court, by making any order at the present moment, might be doing that which would have to be set aside, and that the property in question may be lost to the estate if a judgment should be ultimately pronounced adverse to the petitioner. They do not come for an order to stay the proceedings; but the petitioner calls upon us to make an order for payment

of that which may turn out not to belong to him. All that I feel is, not that we should decline to hear the present petition, but that, having heard it, we should defer giving the direction which the petitioner asks under existing circumstances. As I thought on the former occasion (a) so I think now, that this is not a question to be settled on petition in bankruptcy. The case comes back to us, declaring the petitioner entitled to the proceeds of the estate. But in granting the appeal his Lordship may have felt that it was not proper to conclude so important a question as that of international law on petition in bankruptcy; and that as a question of contract, and not of the mere administration of a bankrupt's estate, it ought to have been brought forward rather by bill in equity. The assignees by their counsel state fairly that they have the intention of prosecuting this appeal in certain events, and I think we ought to give credit to them in making that statement. We are proceeding to hear this petition, having regard to that statement, prosecuted certainly to the extent at present of obtaining leave to appeal. Upon a question of so much nicety and importance some little delay must be allowed for. There is no evidence of unnecessary delay; but before we decide the matter one way or the other I should like to be better satisfied that the assignees would within a limited time state decidedly whether they will prosecute the appeal or not; and therefore I should, if my learned colleague is of the same view, propose that they should have till the last day of term to decide upon the matter, letting the petition stand over accordingly.

Mr. *Russell* undertaking to be prepared with a definitive answer as to the intention by the last day of term,
The petition stood over accordingly.

1840.

Ex parte
POLLARD.
In the matter
of
COURTNEY.

(a) *Mont. & Ayr.* p. 350.

1840.
 —
Ex parte
 POLLARD.
 In the matter
 of
 COURTNEY.
 C. of R.
 May 13,
 1840.

Mr. *J. Russell* this day stated that the assignees declined to proceed with the appeal to the House of Lords, and were willing to submit to the common order being made.

Mr. *Swanston* and Mr. *Anderdon* :— The common order would throw the burden of all the costs upon the produce of the mortgaged property; but here extraordinary costs have been incurred by the litigious spirit of the assignees. They have not appeared like ordinary trustees, merely submitting their rights to the judgment of the Court, but have acted as adverse parties. The costs of the appeal to the Lord Chancellor, and the subsequent costs incurred in applications to this Court, ought not to be thrown on the mortgaged fund, but upon the bankrupt's general estate.

Mr. *J. Russell* :— The petitioner has proved and received a dividend in respect of the entire debt which is secured by his mortgage, and therefore it was absolutely necessary for him to bring the assignees here to have his proof expunged, and to refund the dividend, before he could get an order that the proceeds of the security should be paid over to him.

Per Curiam :— That makes no difference; he must have come here, in any event, whether he had proved or not. The costs of the appeal and of this application must come out of the general estate. Costs of appeal and “consequent” thereon embraces all those incurred subsequent to the appeal in this case. The other costs must come out of the mortgage fund.

Ordered, that the proof made by the petitioner be expunged, with liberty to retain dividends received by

him on such proof, amounting to 240*l.* 18*s.* 2*d.*, in part satisfaction of what found due on account after mentioned; to take account of money due under the mortgage; and it being admitted that the property had by mutual consent been sold, and that it had produced 1,305*l.*, now in the hands of the assignees, ordered, out of that sum, that the costs of the assignees and petitioner in taking up title to property, and of sale, and of petitioner and assignee of original petition, and the costs of appeal, and of the present application incurred by the petitioner, should be paid. The assignees' costs of appeal and of the present application out of the bankrupt's general estate. The surplus of the 1,305*l.*, and, if insufficient, the 240*l.* 18*s.* 2*d.*, to pay the petitioner's mortgaged debt.

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Ex parte
POLLARD.
In the matter
of
COURTNEY.

Ex parte JOHN ROBERTS. — In the matter of
ROBERT GORDON ROBERTS.

C. of R.
April 16,
1840.

MR. O. ANDERDON applied by motion that the above named *John Roberts*, as the bankrupt's next friend, might be allowed to make the usual affidavit of the bankrupt's conformity with the requisites of the statute (b),

Bankrupt having become lunatic, a next friend allowed to make the usual affidavit of absence of fraud, &c. in obtaining allowance by, and consent of, commissioners and creditors. (a)

(a) S. P. *Ex parte Pearson, re Roberts*, 25th Nov. 1839.

(b) " And be it enacted, That such certificate shall be signed by four fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of twenty pounds or upwards, or after six calendar months from the last examination of the bankrupt, then either

by three fifths in number and value of such creditors, or by nine tenths in number of such creditors, who shall thereby testify their consent to the said bankrupt's discharge as aforesaid; and no such certificate shall be such discharge, unless the commissioners shall, in writing under their hands and seals, certify to the Lord Chancellor that such bankrupt has made a full

1840. in lieu of the bankrupt himself, with the view to the allowance of his certificate; the bankrupt having, since the certificate was allowed by the commissioners, become a lunatic, though no commission of lunacy had been taken out.

Ex parte
ROBERTS.
In the matter
of
ROBERTS.

The Court, under the circumstances, made the order as prayed.

C. of R. *Ex parte* ROBERT CASTLE and other creditors.—
Jan. 22, In the matter of RICHARD JONES TODD.
1840.

Fiat having issued, if commissioners cannot or decline to act, alternative offered to petitioning creditor, asking removal to fresh list and an extension of time, either leave to take out a new fiat to fresh list, or to amend fiat accordingly, without extension of time. Applications to extend time to open fiat, to give effect to negotiations for compromise, discountenanced.

IN this case the fiat issued on the 3d January 1840, directed to *Henry Sockett* esquire, and *Edward Priest Richards*, *Stephen Towgood*, *William Meyrick*, and *Walter Morgan*, the Cardiff list of commissioners. Since then negotiations had been pending for a compromise between the bankrupt and his creditors. The above *Edward Priest Richards* and *Stephen Towgood* were creditors, and declined to act, and the other commissioners also declined. The petitioners and several other creditors resided at Bristol, and were therefore, in this state of circumstances, desirous that the fiat should be amended, by transferring it to a Bristol list of commissioners, and for a month's further time to open the same.

discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner hereby directed, and unless the bankrupt make oath in writing that such certificate and consent

were obtained without fraud, and unless such certificate shall, after such oath, be allowed by the Lord Chancellor, against which allowance any of the creditors of the bankrupt may be heard before the Lord Chancellor."—
6 G. 4. c. 16. s. 122. See 1 *Mont.* and *Ayr.* Dig 338.

Mr. *Wordsworth* in support of the application.

1840.

Per Curiam :—The pendency of negotiations for a compromise has always been declared by the Court to be a reason against an application for extending the time for opening the fiat.(a) It would give an opportunity of abusing the process of this Court, and turning it into the means of harassing the bankrupt, by suspending it *in terrorem* over his head(b), and driving him and his friends into an unfair composition. It would therefore have been more prudent to have left that statement out of the petition. In this case, however, there are peculiar circumstances. Two of the commissioners named are creditors and cannot act, and the others decline to act, because, as we are informed, of the distance at which they live. The only point is, whether there should be a new fiat, or whether the old one can be amended, by adding the names of the fresh list of commissioners, and directing it to a new place.(c) If the latter course be adopted we cannot extend the time, and if the former, all the consequences in point of expense must ensue. The petitioners may either take a new fiat, which will give them all the time they can require, or they may amend the fiat without further time.

Ex parte
CASTLE
and others.
In the matter
of
TODD.

Ordered accordingly in the alternative.

(a) In the next case called on, § Ch. 210; *ex parte Sirk*, 3 M. re *Molineux*, an application of § A. 209; S.C. 2 Dea. 328.

that nature in which there were (c) A doubt existing in the no special circumstances was mind of Sir John Cross whether refused. this had ever been done, on reference to Mr. Barber, Reg. that

(b) See *ex parte Downton*, 1 Dea. § Ch.; re *Moody*, 2 Dea. doubt was removed.

C. of R.
Nov. 25,
1839.

Ex parte RICHARD SOUTHALL. — In the matter
of RICHARD SOUTHALL.

Petition to supersede charged that petitioning creditor's debt was composed of bill of costs of attorney in action. Petitioner contended, that through negligence cause was lost, and business useless, and that attorney agreed to take costs out of pocket only, (see *ante*, p. 346.)

Reference by consent to registrar to tax costs, having regard to question of negligence, and to ascertain what due, and state special circumstances. Held, he ought to have considered the contract, and to have taxed accordingly, and that the order of reference so taken by consent was no waiver of the objection founded on the contract.

THIS was a petition excepting to the registrar's report and certificate. (*a*)

The petition stated the former order made on the original hearing of this matter. (*a*) By that order it was, *inter alia*, referred to Mr. Gregg to tax the bill of costs, &c. of *Henry Smythies*, and to ascertain and certify what was due to him in respect of such bill; and in making such taxation the registrar was to take into his consideration whether there was any, and, if any, what part of such costs, &c. which Mr. *Smythies* was not entitled to recover in respect of the imputed negligence of *Smythies* in the original petition mentioned; to examine on interrogatories, for production of all books, &c.; and to be at liberty to state special circumstances, at the request of either party. The original petition retained until certificate, with liberty to the parties to apply.

The petition proceeded to state, that Mr. Gregg proceeded with the reference, and prepared a draft of his report and certificate, and that the petitioner carried in exceptions to the same, which were, amongst others, as follows:—

“First objection.—For that the said *Francis Gregg* esquire, in taxing the bill of costs, fees, and disbursements in the said draft certificate mentioned, has taxed the costs of the action at law in the said bill mentioned in the ordinary way between attorney and client; whereas the said *Francis Gregg* esquire ought, in taxing the costs of such action, to have allowed only the costs out of pocket of such action, pursuant to the contract in that behalf entered into by *Henry Smythies*, in the said draft certificate named.”

(*a*) See this case on the prior occasion, *ante*, p. 346.

“ Eighth objection.—For that the said *Francis Gregg* esquire has, in and by the said draft of his said certificate, certified that there is no part of such bill as is therein mentioned which the said *Henry Smythies* is not entitled to recover by reason of his imputed negligence in the petition mentioned; whereas the said *Francis Gregg* esquire ought not to have so certified, and the said *Francis Gregg* esquire ought to have certified that there is a part, that is to say, the costs of the action at law on the bill mentioned, which the said *Henry Smythies* is not entitled to recover by reason of such imputed negligence.”

“ Twelfth objection.—For that the said *Francis Gregg* esquire has not in the said draft of his said certificate stated the special circumstances which the said *Richard Southall* the younger has requested the said *Francis Gregg* esquire to state.”

Mr. *Gregg* overruled the objections, and made his report or certificate, dated the 13th day of August 1839.

The petitioner contended that, as to the first objection, there was full evidence of the contract therein mentioned stated by the petitioner before Mr. *Gregg*, but he refused to recognize the same; and, as to the eighth objection, there was sufficient evidence before him of the negligence therein mentioned.

The petitioner craved leave to refer, in support of this petition, to the whole of the evidence laid before Mr. *Gregg* on such reference, and to the other grounds appearing on such evidence.

The petitioner submitted, that Mr. *Gregg* ought not so to have reported or certified as he has done, and therefore excepts to the said report or certificate in the particulars above mentioned, and prays that the same may in these respects be rectified.

The petition prayed, that the said exceptions thereby

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Ex parte
SOUTHALL.
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of
SOUTHALL.

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Ex parte
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 In the matter
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Mr. *Russell* and Mr. *Bethell* for the solicitor:—The order to ascertain what is due is only intended to guard any payments that may have been made upon the bill. We contend that by obtaining the former order to tax the petitioner has bound himself to pay that amount, subject to what shall be struck off according to the usual rules of taxation, and that therefore he is precluded from going into the question of the justice of the claim. [Sir *John Cross*:—Can that be so? Suppose the question is the amount of the petitioning creditor's debt, and that arises out of a tradesman's bill. If the quantum of petitioning creditor's debt were referred to the officer, can you contend he is not bound to inquire into all the equities affecting the debt?] But the direction to state special circumstances does not extend beyond the case made on the petition and on the face of the order. Here the petition refers to the contract, but the order went entirely upon the point of negligence, without referring to the contract. This was an abandonment of that part of the petitioner's case, and therefore the registrar was perfectly justified in refusing to enter into any inquiry concerning it. It is also to be recollected that the order of reference was taken by consent, and must therefore be construed most strictly against all parties consenting; nothing must be presumed but what appears on the face of it. It contains nothing but the common direction to tax, with a requisition to state special circumstances, which must be construed only with reference to the particular inquiry directed *secundum subjectam materiam*.

Mr. *Swanston* was not called upon to reply.

Sir *John Cross*:—We must bear in mind what is the nature of that which is sought to be excluded from our consideration. The allegation in the petition is, that it

was agreed (a) that costs out of pocket only were to be charged. If the Court had undertaken to decide the amount due to the respondent on the question of the amount of the petitioning creditor's debt, it must have decided it as a question of law or equity, and have gone into the question of contract. It is not pretended by the respondents that that question has yet been decided, but the object of the respondent is to exclude it altogether, though it is but mere common justice to examine into it. I think that the registrar being for these purposes placed in the stead of this Court, ought, in ascertaining what is due, to have noticed this agreement, and to have acted upon it; having omitted so to do, his certificate must be reviewed.

Sir George Rose:—It is pressing the case too far to say, that to the extent contended for this was an order by consent; the consent only applied to the point of negligence. The essential question sent to our officer was, what he ought to allow, and what an action at law would have entitled the respondent to. In that way of looking at it it is impossible to contend that the agreement should have been disregarded. It must therefore be referred back to Mr. Gregg, upon the question of the amount due, he to have regard to the alleged agreement as to the amount to be charged for the business done.

Ordered accordingly.

(a) The mode in which the agreement was charged to have existed was thus stated in the petition, "That the said *Henry Smythies*, previous to trying the said action, had expressed himself so satisfied (to your petitioner)

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Ex parte
 SOUTHALL.
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of the result, that he said 'I am so certain of winning, that I will take the responsibility upon myself. At all events I will charge only costs out of pocket should the result be unfavourable.' "

1840.
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Ex parte
 LEAF
 and others.
 In the matter
 of
 SIMPSON
 and another.

fiat also issued against *Simpson* and *Windross*, as surviving partners of *Dawson*, *Simpson*, and *Windross*. The 400*l.* and 200*l.* at that time remained in the hands of *Allan* and *Simpson*. There was other property belonging to the estate of *Windross*, derived from his general property, not connected with the funds of *Dawson* and *Windross*.

The commissioner had directed that the two sums of 400*l.* and 200*l.* should be considered as the separate estate of *Windross*, and distributable as such among his separate creditors, and his assignees were about to make a dividend.

The petition prayed that the two sums of 400*l.* and 200*l.* might be declared joint property of *Dawson* and *Windross*, and that be divided accordingly, and to stay any dividend in respect thereof under the separate estate of *Windross*.

Mr. *Bethell* for the petitioners :—

The question in this case, arising out of the administration of the assets under the several fiats, is to which estate the 400*l.* and 200*l.* remaining in the hands of *Allan* and *Simpson* belonged ; whether to the separate estate of *Windross*, or to the joint estate of *Dawson* and *Windross*. The respondents, the separate creditors of *Windross*, whose debts were contracted by him before as well as since the death of *Dawson*, insist that they are exclusively entitled to it as the separate estate of *Windross* ; while the petitioners, on behalf of the joint creditors, contend that the property in question still remained the joint property of *Dawson* and *Windross*, and therefore distributable among the joint creditors. We say it was not, as contended for on the other side, in the order and disposition of *Windross*.

The Court called upon

Mr. *Anderdon* for the separate creditors:—On the death of *Dawson* the property of the firm in the bankers' hands became the property of the survivor for every purpose. It became the separate fund of *Windross* as surviving partner. [Sir *John Cross*:—Can you say that at the death of *Dawson* his executors had no interest in the money lying in the bankers' hands?] If we were to commence tracing back the proprietorship in this fund, in order to ascertain whether or not it was the property of *Dawson* and *Windross*, we should find that in fact it emanated from and perhaps constituted the property of *Dawson*, *Simpson*, and *Windross*. But we apprehend that cannot be done. The executors of *Dawson* may have a right to an account as against *Windross*, but they cannot claim this specific property. At the bankruptcy of *Windross* it is found in his order and disposition, and therefore passes to his assignees. [Sir *John Cross*:—How can you put it that it was in the order and disposition of *Windross* within the meaning of the bankrupt laws? In order to that there must be the consent of the true owner; but here the true owner was dead, and there was no one to consent. Your argument would amount to this, that if *A.* and *B.* were partners, *A.* died, and on the next day *B.* was declared a bankrupt, that the whole of the partnership property would belong to *B.*, and go to his separate creditors, and that the joint creditors must be wholly excluded.] The hardship may appear very great, but the same principle must apply whether it be a day or a year between the two events of death and bankruptcy. Supposing a year elapses before the bankruptcy, will any one say the Court could then deal with property found in the hands of a surviving partner as the joint property of the quondam firm? Certainly not, the Court deals with the fund as they find it;

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and others.
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of
SIMPSON
and another.

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 and another.

“as the tree falls so shall it lie;” and this property must therefore be taken to be the separate estate of *Windross*.

Mr. *Bethell* was not required to reply.

Sir *John Cross*:—The original partnership of *Dawson*, *Simpson*, and *Windross* is wholly immaterial to this question. *Dawson* and *Windross* were partners, and we find that 600*L* were in the hands of their bankers when *Dawson* died, and the money stood in their joint names. This money was wanted for a particular purpose, and was taken out and applied by his surviving partner, *Windross*, for that purpose, and handed over to trustees, upon the understanding that if the object of so depositing it failed that it should be returned by them; that is, restored to its original position. In this state of circumstances, how could it be in the order and disposition of *Windross* alone? To establish the bearing of this law of forfeiture, which I always consider that of order and disposition and reputed ownership to be, it is necessary to make out a strong case of consent on the part of the true owner; but here, as I have already intimated, no true owner did consent or could consent, because *Dawson* had ceased to exist. Though a partner may sue alone, as such, that does not vest in him the sole right of the subject recovered by that suit; and at most *Windross* stood in the position of trustee for himself and the representatives of *Dawson*. To hold that this is part of the estate of the surviving partner alone would lead to immense evils as well as absurdities, as in the case I put during the argument. I consider these sums clearly applicable to the joint debts of *Dawson* and *Windross*.

Sir *George Rose*:— I am of the same opinion, and should have regretted extremely if any principle of law could have raised a doubt as to the funds in question belonging to the estate of the partnership. The fund is here found specifically existing as partnership, and it is just like the case of a bale of goods or any thing else that you can earmark and follow.

1840.

Ex parte
LEAF
and others.
In the matter
of
SIMPSON
and another.

Ordered as prayed.

Ex parte FREDERICK HUTH, JOHN FREDERICK GRUNING, DANIEL MEINERTZ-HAGEN, and CHARLES FREDERICK HUTH.—In the matter of BUSICK RICHARD PEMBERTON.

THE petition stated, that the above-named bankrupt, together with *Thomas Daniel Meriton*, since deceased, carried on business in co-partnership as wool brokers in London, and on the 8th April 1839 the petitioners employed them to sell a quantity of wool, and on that day they represented to the petitioners that they had contracted for the sale of sixteen bags of wool, the property of the petitioners, to *Roberts and Ledger* of Leeds, merchants, and sent to petitioners the following sold contract, as being the agreement which they had made :

“ London, 8th April 1839.

“ Messrs. *Frederick Huth* and Co.

“ We have this day sold by your order and for your account to Messrs. *Roberts and Ledger* of Leeds sixteen bales of German wool, (viz.)

x x 2

C. of R.
Jan. 28,
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Goods sent to broker for sale, he sells, according to sold note, ostensibly to A. B., but secretly, and according to bought note, to A. B. and self. A. B. insolvent. Broker bankrupt, and at time of bankruptcy goods remain in his possession. Held, contract void, and that owner might reclaim them specifically.

1840.		s.	d.		s.	d.
	383 - 1 Bale, at	2	4	349 - 1 Bale, at	1	6
<i>Ex parte</i>	397 - 1 —	1	10	350 - 1 —	1	5
HUTH	243 - 1 —	1	6	680 - 1 —	1	5
and others.	238 - 1 —	1	8	689 - 1 —	1	11
In the matter	221-2 2 —	2	5	639 - 1 —	1	11
of						
PEMBERTON.	239 - 1 }	—	2 1	564 }	2	—
	241-2 2 }	—		364 }	—	2 1

“ Customary allowances for tare and draft payable as follows: — By their acceptance to our draft half the amount at three months from date of contract, less $3\frac{1}{2}$ per cent; remaining half at four months, from 8th May, less $2\frac{1}{2}$ per cent. discount, and remain

“ Your obedient servant,

“ *B. R. Pemberton and Co.*”

“ Brokerage 1 per cent.

“ Guarantee 1 per cent.

Before any payment became due under the contract a fiat, dated the 26th day of June 1839, issued against *Pemberton*.

Roberts and Ledger had since stopped payment, and no money whatever had been received by the petitioners under the contract.

Since the issuing of the fiat the petitioners discovered that the sixteen bales of wool were not *bond fide* sold by *Pemberton* and *Meriton* to *Roberts and Ledger*, but in fact *Pemberton* and *Meriton* entered into an agreement with *Roberts and Ledger* to take the wool on a partnership account between them, and accordingly the bought contract sent to *Roberts and Ledger* by the bankrupt had added to it the words following:— “ It is agreed that we join at profit or loss upon the above in lieu of brokerage.”

This latter agreement was concealed from petitioners, who believed the said wools had been *bond fide* sold to Messrs. *Roberts and Ledger*.

The delivery order for the wools was made out to the order of *Roberts* and *Ledger*, but was indorsed by them, and handed over to *Pemberton* and *Meriton*, who in fact took possession of the wool, and sent it to a manufactory occupied by themselves at Trowbridge in Wiltshire.

At the time when *Pemberton* was declared bankrupt nine of the bales remained, and were in his hands at his premises in Trowbridge aforesaid, and the remaining seven bales had been disposed of by him.

The nine bales were taken possession of by the assignees, and remained in their hands.

The petition prayed, that it might be declared that the petitioners were entitled to have such of the sixteen bales as were in the possession of the bankrupts at the time of his bankruptcy, and had been taken possession of by his assignees, restored and delivered up to the petitioners; and that account might be taken of the residue of the sixteen bales of wool, and the disposal thereof; and in case it should appear that any sums were, at the time of the issuing of the fiat, outstanding and unreceived by the bankrupt in respect of his disposal of the wools or any part thereof, that it might be declared that the petitioners were entitled to receive the same; and for liberty to prove, if needful.

Mr. *Bethell* for the petitioners:—The bankrupt being employed as broker to sell the wools, it was a fraud on his part in the eye of the law to purchase them on his own account, and the sale was void. In consequence they remained in the bankrupt's hands as agent for the petitioners up to the period of his bankruptcy, and unsold, as though no contract for sale had been made *de facto*. In *ex parte Dyster* (a) Lord *Eldon* says, if a

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Ex parte
HUTH
and others.
In the matter
of
PEMBERTON.

(a) 2 *Rose*, 354.

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 —
Ex parte
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party has introduced himself as broker and principal in the same transaction, a contract arising out of such conduct would, without reference to any act of parliament or other regulation, but upon the principles of common law, be good for nothing. No action could be sustained upon a transaction so fraudulent.

Mr. Swanston for the assignees of *Pemberton*:—The petitioners, if they have any remedy, have no title to apply to this Court. This is a question of title paramount to the fiat, and this is not the proper tribunal to try that question.

Mr Cameron for *Roberts* and *Ledger*.

Sir J. Cross:—The bankrupt standing in the character of broker had no authority to enter into such a contract as is here disclosed. He was guilty of a breach of trust in selling to himself. It is a transaction which cannot be justified in point of law, and therefore the petitioner has a right to the specific delivery up of the nine bales of wool found to be in his possession at the time of his bankruptcy.

Sir George Rose:—If a party comes here seeking the delivery up of specific chattels as his own, and stating that if not delivered up he will be entitled to prove, this Court has, at all events, jurisdiction to entertain the question of right. How far it will deal with it is another matter. In this case the property in question came to the hands of the bankrupt in his character of broker. They remain in his hands at the time of the bankruptcy. Then the question arises, how far the character of broker and agent has been extinguished by the ostensible sale to *Roberts*. This the assignees can only make out by production of the broker's "bought note," which discloses that the sale was fraudulent, as being made to

himself and *Roberts* and Co., and, according to the case of *ex parte Dyster* (a), void. The goods are therefore found in his hands as broker and agent merely, and must, under these circumstances, be delivered up.

Ordered as prayed.

1840.

Ex parte
HUTH
and others.
In the matter
of
PEMBERTON.

Ex parte THOMAS WHITBY.—In the matter of
THOMAS WHITBY.

C. of R.
July 20,
1839.

THIS was a petition to annul the fiat, and it stated that on the 27th April 1839 *Webb*, the petitioning creditor, under the 1 & 2 Vict. c. 110. s. 8., filed an affidavit of debt, stating that the above petitioner was a trader, and stood indebted to him in 517*l.* 11*s.* 2*d.*; that on the same day *Webb* served a copy of the affidavit on the petitioner, with a notice requiring immediate payment of the debt and interest, with which the petitioner did not comply; that on the 27th June a fiat issued, which was not issued within two calendar months from the filing of such affidavit.

The act of bankruptcy was also contested; it was alleged to have arisen under these circumstances:—The bankrupt had hired some carts and waggons, and had re-delivered them to the lender, in order to avoid an execution. This, it was alleged, was a fraudulent preference; but it appeared that he had so re-delivered them upon a notice to that effect given by the lender.

In computing the "two calendar months" under the 1 & 2 Vict. c. 110. s. 8. the day on which the affidavit of debt was filed must be included. Therefore, where affidavit was filed on the 27th April, and the fiat (though earlier in the day) issued on the 27th June, held too late, and fiat annulled. Return of goods by hirer to lender under threat of fiat in bankruptcy, *semble*, not an act of bankruptcy as a fraudulent preference.

Mr. *Swanston* and Mr. *Harrison* for the petition:—
Is the removal of goods to avoid an execution an act of bankruptcy?

(a) 2 *Rose*, 354.

1839.

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Ex parte
 WHITBY.
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 of
 WHITBY.

Mr. *Bethell* for the respondents:—Certainly, where the intent is to give the party taking them a preference, by making them part payment.

Per Curiam:—How can it be treated as a fraudulent preference in the face of the notice, that if the property were not re-delivered the lender would strike a docket against the hirer?

Mr. *Swanston* and Mr. *Harrison*:—But the strongest part of our case, and on which we desire to take the opinion of the Court, is, that this fiat was not taken out within the two months prescribed by the statute. The 1 & 2 Vict. c. 110. s. 8. provides, “ That if any single creditor, or any two or more creditors being partners, whose debts shall amount to one hundred pounds or upwards, or any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty’s courts of bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts, and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums

as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise." And according to the authorities on the subject the day on which the affidavit of debt was filed must be taken inclusive. In *ex parte Farquhar* (a) it is held, that where, under 6 G. 4. c. 16. s. 81., the computation of time is to be from an act done, the day when such act is done is to be included; and in the more recent case of *Godson v. Sanctuary* (b) a similar decision in principle was arrived at. In that case a *fieri facias* was sued out on judgment entered upon a writ of attorney, and the sheriff seized the debtor's goods before ten in the forenoon of the 13th August, and sold them ten days after. On the 13th October following, about noon, a commission issued against the defendant, under which he was declared bankrupt; and it was held, that more than two calendar months had elapsed between the execution and the issuing of the commission. And *Parke, J.*, there says (c), " Now if the day of the act done is taken

1839.

Ex parte
WHITBY.
In the matter
of
WHITBY.

(a) *Mont. & M.* 7.

(b) 4 *B. & Adol.* 255.

(c) *P.* 262, 263.

1839.

Ex parte
 WHITBY.
 In the matter
 of
 WHITBY.

into consideration, as it should be, according the argument of the Master of the Rolls in *Lester v. Garland* (a), as applicable to that case, where plaintiff is privy to act, then the day of seizure here must be reckoned as one, and consequently if the commission issued at any time on the 13th October it issued more than two calendar months after the execution. *Ex parte Farquhar*, which was first decided by Sir John Leach, and afterwards by Lord Lyndhurst, is decisive on this point, substituting for "two calendar months" the words "one day before the issuing of the commission." The case will be clear, as the 13th August would be one day before, any time on the 14th August would be more than one day. Thus clearly showing that the day on which the affidavit was filed is to count, and must be reckoned as one of the days constituting the two calendar months mentioned in the act.

Mr. Bethell for the respondents: — If, as we contend it should be, the fraction of a day is to be allowed, then, reckoning the two calendar months by the number of hours, this fiat appears from the affidavits to have been taken out within a hour and a half of the completion of the two months. According to our view of *ex parte Farquhar* (b), the day on which the act is done, or that on which the act from which the time dates, is to be excluded. In *Thomas v. Desanges* (c) the sheriff took possession under a *fiery facias*, and at a later hour on the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison for two months, and thereby committed an act of bankruptcy, and by the statute of James was a bankrupt from the time of

(a) 15 Ves. 248.

(b) *Mont. & M.* 7.

(c) 2 B. & Ald. 586.

his arrest; and there, in an action by his assignees to recover the value of such goods against the sheriff, it was held that the Court would notice the fraction of a day, and therefore that sheriff having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover.

1839.

—
Ex parte
WHITBY.
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of
WHITBY.

Sir *George Rose* : — It is never done for the purpose of sustaining a fiat against a bankrupt. (a) In *Thomas v. Desanges* Lord *Tenterden* expressly draws the distinction. He says, that “as it respects the interests of third persons the day ought to be divided.”

Mr. *Swanston* was not called upon to reply.

Sir *John Cross* : — Universally and without exception there must be a fraction of a day on which an act is done, and that day is never excluded. There is nothing in the first act of bankruptcy sought to be established. The question is, whether this fiat was sued out in time. In *Rex v. Adderley* (b) an act of parliament provided that no sheriff should be liable to be called upon to make return to any writ, &c., unless required so to do within six months after the expiration of his office; and there the Court said, that “where computation of time is to be made from an act done (as from the sight of a bill payable at sight) the day when such act was done is to be included;” and in *Castle v. Burdett* (c) the same doctrine was upheld, and it was put that where the law requires one month’s notice of action to be given the month begins with the day on which the notice is served. So according to the case of *Glaslington v. Rawlins* (d), in the act of bankruptcy by lying in prison for twenty-one days, the day of arrest is

(a) See *ex parte Dufrene*, 1 V. & B. 54; *Wydown’s case*, 14 Ves. 80.

(b) *Doughl.* 463.

(c) 3 T. R. 623.

(d) 3 East, 407.

1839.
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Ex parte
 WHITBY.
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included. There are cases apparently contrary, but they turned upon the consideration of the Courts for third persons. In *Lister v. Garland* (a) the day on which the act was done was excluded, in order to prevent a forfeiture which the including it would let in, and the decision turned on the peculiar circumstances of the case. So in *Hardy v. Ryle* (b), where the question was, whether an action for false imprisonment was commenced against a magistrate in the six months; the Court, holding in the affirmative, excluded the day on which the act was done, namely, the last day of imprisonment, on the principle, apparently, that the plaintiff might be presumed to have been in prison during the whole of that day.

The general rule, however, subject to few special exceptions in peculiar cases, is to include the day on which the act is done from whence the time runs. In the present case the act of parliament is for the benefit of the trader, and he is to be favoured as much as the Court reasonably can do so. The day on which the affidavits was filed must therefore be included, and, consequently, when this fiat issued more than two calendar months had elapsed since the day on which the affidavit was filed. (c)

Sir George Rose concurred.

Fiat superseded, with costs.

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| <p>(a) 15 Ves. 248.
 (b) 9 B. & C. 608; 4 Man. & R. 295.
 (c) See the cases of <i>Manners v. Bryan</i>, 5 Sim. 147, affirmed 1 Myl. & K. 455; <i>ex parte Dufrene</i>, 1 V. & B. 54; <i>Wydown's case</i>, 14 Ves. 80. In <i>Ansdell v. Whitfield</i>, 6 Sim. 356, held, that</p> | <p>the fourteen days mentioned in the 11 G. 4. & 1 W. 4. c. 56. s. 11. are exclusive of the first and inclusive of the last. The words of that section are, that if any person in contempt, &c. "shall, after fourteen days previous notice in writing," &c. refuse, &c. then, &c.</p> |
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Ex parte JOHN TARLETON, in the matter of
JOHN TARLETON.

C. of R.
Nov. 20,
1839.

IN this case a long petition framed for various purposes was presented, but all except that part which prayed that the bankrupt might be allowed to surrender to his commission was abandoned for the present, inasmuch as till that was taken he could have no *locus standi in curia*. The commission issued in June 1815, and the bankrupt had ever since continued abroad, and had disputed the validity of the commission in a variety of ways.

After twenty-three years contumacy bankrupt allowed to surrender. Such an order is almost of course. Court of Review will not appoint time, &c. for bankrupt to surrender; that is the office of commissioner. Where bankrupt allowed costs of surrender out of his estate.

Mr. *Swanston* and Mr. *Russell* for the petitioner:— Upon the present occasion we only ask liberty to surrender, and that time may be given for that purpose, retaining the rest of the petition in the meantime.

Mr. *Spence*, Mr. *Girdlestone*, and Mr. *Sharpe* for the assignees:—The Court ought not to retain this petition hanging over the heads of the assignees. The petitioner is now in contempt, and can ask nothing of the Court but liberty to surrender. For twenty-three years the bankrupt has continued contumacious, and has put his estate to an enormous expense by the litigation he has heaped upon it. If the Court permits him to surrender it can only be at his own expense; *ex parte Carter* (a); and he must state within what time he intends to surrender.

Mr. *Swanston* proposed that he should have six months within which he should be at liberty to sur-

(a) 4 *Mad.* 394.

1839.
 —
Ex parte
 TABLETON.
 In the matter
 of
 TABLETON.

render. He asked that time because the petitioner was now very old, being upwards of eighty-three years of age, and it might endanger his life if he were obliged to go at the present time of the year to Liverpool to surrender.

Mr. *Spence* consented to this arrangement.

Sir *George Rose* :—It is not within the province of this court to appoint the time within which the surrender shall be made. That is the commissioners duty. We can only give the common order for liberty to surrender at such time and place as the commissioners shall appoint.

Mr. *Spence* cited *ex parte White (a)*, where a bankrupt having purposely abstained from surrendering his subsequent petition for that purpose was dismissed.

Per Curiam :—If the bankrupt had applied to surrender within a reasonable time, it might have been a question, whether the costs would not have come out of the estate; but looking at the circumstances of this case, the great delay the bankrupt has been guilty of in applying for leave to surrender, he must pay the costs of the meeting for that purpose. When *ex parte White (a)* was decided it was felony and death to refuse to surrender to a commission, and leave to surrender after the proper time had elapsed was only granted in cases where the Lord Chancellor thought he could from the circumstances out of which the delay arose advise a pardon in the event of a prosecution for the omission. (a) But now the commissioners take the sur-

(a) 2 Bro. C. C. 47; and see cases, 1 *Mont. & Ayr.* B. L. 300, note (q), and *ex parte Johnson*, 14 *Ves.* 41; *Anon.* 15 *Ves.* 1.

render on the recommendation of the Court almost as of course.

1839.

Take the common order, bankrupt paying costs of order for liberty to surrender and of meeting for surrender, and retain the rest of the petition.

Ex parte
TARLETON.
In the matter
of
TARLETON.

Ex parte JOSEPH GAURY and FREDERICK WILLIAM SEDGWICK. — In the matter of RICHARD WALTER.

C. of R.
Jan. 28,
1840.

THE question in this case was, which of two flats should be preferred?

The bankrupt carried on business at Coventry as ribbon manufacturer, and in London as warehouseman, trading in London under the name of *R. Waller and Co.* The petitioner, *Gaury*, at a few minutes after ten o'clock in the morning of 25th January 1840, searched the docket book at the Bankrupt Office, and found thereon entered a docket struck on the 23d January by *Thomas Brown, John Brown, and John Harris*, of Coventry, against the bankrupt, described only as of Coventry; and the petitioner learnt that the affidavit on which the docket was struck was insufficient, and that fresh affidavit and docket papers, omitting his London place of business, were tendered on the 25th, a few minutes before the petitioner arrived at the office; but no fresh docket had been entered. The petitioners then tendered their docket papers and bespoke and paid for the fiat, describing the bankrupt of both places, but of London as "*Waller and Son.*" The petition prayed that the town fiat bespoke by the petitioners might be delivered out to them.

Bankrupt trading at Coventry in his sole name, and in London as "*A. and Co.*"

Docket struck describing him as of Coventry only; another docket struck describing him of both places, but of London as "*A. and Son.*" Held, latter docket should be preferred, but without prejudice to any other creditor. Leave to amend docket papers. If first petitioning creditor was ignorant of both places of trading, costs given him out of estate.

Bankrupt trading in London and country, a town fiat issues of course, unless special order obtained for country fiat.

1840.

Mr. *Bacon*, for the petition, cited *ex parte Hill*. (a)

Ex parte
GAURY
and another.
In the matter
of
WALTER.

Mr. *Swanston* for Messrs. *Brown* :—The petitioners affidavit of debt describes the bankrupt as trading in London under the name of “*Walter and Sons* ;” “*Walter and Co.*” being the correct description. Both dockets are therefore incorrect.

Per Curiam :—The more correct docket papers command the right to the fiat. In this case it must be given to the petitioners. If Mr. *Swanston*’s clients were aware the bankrupt also traded in London, they must pay the costs of this application. If the original docket papers had described the bankrupt of London as well as of Coventry, the fiat would not have gone to the latter place, without a special order. But it is said both sets of papers are defective. That is not to the point as between the two contesting parties. We receive the petitioner’s papers, because they are the more correct of the two ; but a different question would arise, if a third party had come in with papers in every respect correct. The petitioner may amend without prejudice. (b) If Mr. *Swanston*’s clients can relieve themselves from knowledge of the trading in London, then the costs of all parties will come out of the estate. Mr. *Bacon*’s clients, the petitioners, will have the fiat, and costs in any event out of the estate.

Ordered as prayed, without prejudice to any other creditor.

(a) *Mont.* 260.

(b) See as to this, *re Rutledge*, 2 *Rose*, 569 ; 1 *Mont. & Agr.* B. L. 77.

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ABROAD, CREDITORS RESIDING.

Upon an application to supersede under the composition clause, it is not necessary that the commissioner shall certify that no creditor to the
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amount of 30*l.* resides out of the jurisdiction, or that the assignees have assented. *Ex parte* and re *Butterworth*, Mont. & Chit. 140.

ACCIDENT.

See ACTUS DEI.

ACCOUNT.

1. Three partners; one becomes bankrupt, another petitions to stay certificate, and to have accounts taken as between him and the bankrupt. Per Sir G. Rose. The third partner must be served with the petition. *Ex parte May, re Malachy, Mont. & Chit. 18.*

2. In the case of an unsettled account, the certificate will not be stayed if the assignees swear, that in their belief, the balance is against the claimant, and it does not appear that he has done every thing that by him ought to be done to fix the balance. If the claimant has endeavoured to have the balance struck, and the assignees collude with the bankrupt, the certificate ought to be stayed. Per Sir J. Cross. *S. C. id. ib.*

3. Assignees being ordered by the commissioners to pay the solicitor's bill, that bill, though settled by them, may be taxed, and it is not to be treated as a settled account. One assignee, stating himself to be also a creditor, may petition for this purpose, though the other assignees object to re-taxation. *Ex parte Fosbrooke, re Fisher, Mont. & Chit. 290.*

4. Money due for calls in respect of shares in a joint stock bank, does not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder without an account first taken. *Ex parte Snape, re Ransford, Mont. & Chit. 607.*

5. A written paper, containing a statement of mutual accounts between a creditor and a bankrupt, by whom it was signed, and bearing date previous to the bankruptcy, shewing a balance due to the creditor, is *prima facie* evidence, as against the assignees, in an action brought by them against the credi-

tor, that it was written at the time it bore date. *Semble*, that such a document is evidence of payment, and not a set-off, and ought to be pleaded as such. *Sinclair v. Baggaley, 4 Mees. & Wels. 312.*; and see *Ex parte Fairman, re Lloyd, Mont. & Chit. 125.*

ACQUIESCENCE.

See also ACT OF BANKRUPTCY, 6.—CONSENT.

1. A bankrupt having granted an annuity ten years since, and paid it for ten years, until his bankruptcy, and having, at the time of granting it, signed an account with the grantor, shewing what the consideration was, is precluded from questioning the validity of that consideration, and so are his assignees. *Ex parte Fairman, re Lloyd, Mont. & Chit. 125.*

2. A year suffered to elapse, and acts of acquiescence before petition to annul by bankrupt presented. Petition dismissed. *Ex parte and re Forrester, Mont. & Chit. 637.*

ACT OF BANKRUPTCY.

1. A., a creditor, strikes a docket, and then abandons it, in order to give effect to a subsequent trust composition deed, of which he becomes a trustee, and expends money of his own in execution of the trust. A fiat subsequently is issued by another creditor. Held, that A., having knowledge of an act of bankruptcy when he accepted the trust, had no lien on the estate in his hands for his advances. *Semble* *secus*, if he had been ignorant or mistaken as to the act of bankruptcy under which he

ACT OF BANKRUPTCY—
continued.

struck the docket. Ex parte *Swinburne*, re *Field*, Mont. & Chit. 119.

2. A creditor assenting to an act of bankruptcy cannot avail himself of it to support a fiat. Ex parte and re *Brown*. Mont. & Chit. 208.

3. The bankrupt, at the suggestion of his creditors, signed a declaration of insolvency, upon the alleged understanding "that it should not be made use of or inserted in the Gazette, unless it afterwards became necessary to do so:" Held, in the absence of evidence of bad faith, that the discretion, as to its insertion, rested with the creditors. Ex parte and re *Rowe*, Mont. & Chit. 334.

4. Return of goods by hirer to lender, under threat of fiat in bankruptcy, *Semble*, not an act of bankruptcy as a fraudulent preference. Ex parte and re *Whitby*, Mont. & Chit. 671.

5. Goods were sold by defendant, as agent of C., in contemplation of C.'s bankruptcy, for the purpose of raising money for defendant, and C., the buyer, did not know the sale to be fraudulent: Held, that such sale was not an act of bankruptcy by C. *Harwood v. Bartlett*, 6 Bing. N. C. 61. S. C. 8 Scott, 171.

Act of Bankruptcy under 1 & 2 Vict. c. 110. s. 8.

6. B. and P. (the petitioners) carried on business as cotton-spinners, under the firm of B. and P., at the Grove Mills, and becoming embarrassed, applied to the M. and T. district banking company for an advance; and it was arranged by a deed, dated 22d August, 1837, that the banking company should take the management of the concern into their hands, by means of J., their

manager, under the firm of the "Grove Mills Company;" that B. and P. should conduct the business as employees of the banking company, at a salary; that the company should pay all debts, and repay themselves out of the profits; and that if they chose finally to wind up and close the concern, they should give B. and P. a full release and discharge from all debts then or to become due. Under this arrangement, the affairs are carried on until the 3d October, 1838, when notice is given to B. and P. that the company intend to close the concern; and at the same time J., the manager, intimates to B. and P. that "they will probably receive a notice from the company, pursuant to the 1 & 2 Vict. c. 110. s. 8., but that it would be a mere matter of form, and that they need be under no apprehension concerning it." On the 22d October following, J., as manager, swore an affidavit of debt, pursuant to the above act, and on the 25th served the requisite notice on B. and P. The affairs having been wound up, B. and P. claimed a release, pursuant to the deed of August, 1837, and on the 6th November filed a bill in Chancery, praying to be declared so entitled. A negotiation for a compromise of the suit was then entered into, and a memorandum of agreement, dated 13th November, was executed, by which B. and P. were to give up to the banking company all they had in the world, on condition that the company should release them from all their claims, and discharge their debts; and it was provided that a clause should be inserted in the deed, making void the release, if B. and P. concealed or withheld any of their property. The proceedings in Chancery are altogether discon-

ACT OF BANKRUPTCY—
continued.

tinued, and the respective solicitors of the parties proceeded to prepare the last-mentioned deed, and the release to B. and P.; and the banking company continued to deal with the property till the 30th November, 1838. On the 15th November, the twenty-one days after the notice provided by the statute expired. On the 30th November, the solicitors for the banking company wrote to the solicitors of B. and P., saying, "that disclosures of improper acts by B. and P. had been made within the last three days, and that further proceedings with the proposed deeds should be stayed for the present," but still appearing to invite explanation. On the same day docket papers are prepared, and on the 1st December a docket was struck; on the 3d, the fiat was issued, which was opened on the 6th: Held, that no act of bankruptcy was committed, because, under the above circumstances, the banking company were to be considered as consenting to the default of payment beyond the twenty-one days, and that they had accepted security, *pro. tem. at*, and prior to the twenty-second day, so as to satisfy the notice given under the statute. The fiat was superseded with costs. *Ex parte and re Brown*, Mont. & Chit. 177.

7. On a petition to supersede, the usual course is, after the petitioner's counsel has opened the petition, to call on the respondent to support the fiat, the onus probandi lying on him; but where the fiat issued under the 1 & 2 Vict. c. 110. s. 8., and the petition shewed that the affidavit of debt, and notice required by the act had been given, it is for the petitioner to shew that the notice has

been complied with, or a sufficient reason why not, the onus probandi lying on the petitioner. *Ex parte and re Brown*, Mont. & Chit. 194.

8. The affidavit, dated 22d April (1839), under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.*, and upwards," on bills of exchange as due to A. the "deponent, and B. and C. his late partners." The notice and requisition to pay (dated the 24th April) was in respect of a debt of 361*l.*, but intended as the same and the real debt, and was signed by A. for B. and C. and himself; on the 24th April, A. filed another affidavit, swearing the debt to be 361*l.*, "upon bills of exchange;" and on the 2d May, A. and B. for themselves and C. gave a corresponding notice. The commissioner approved a bond for 200*l.* as security under the first affidavit, although he had notice that the real debt was the 361*l.* On the 3d June, A., B., and C. issued a fiat on the alleged act of bankruptcy by not having given security under the second affidavit, and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the eighth section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat, and the petitioning creditor's affidavit on striking the docket stated the debt to be due "for goods sold and delivered:" Held, there were not sufficient objections to warrant staying the advertisement in the Gazette. And upon the question of supersedeas, *quære*, whether these, or any of them, are sufficient grounds for superseding. Per Sir G. Rose. The proof of the act of bankruptcy by the solicitor, to the fiat is sufficiently bad to induce the Court to send the question to be tried by ac-

ACT OF BANKRUPTCY—
continued.

tion at law. *Ex parte* and *re Rhodes*, Mont. & Chit. 319.

9. The Court will not order a second amended affidavit under the 1 & 2 Vict. c. 110. s. 8. for the same debt to be taken off the file. *Ex parte* and *re Rhodes*, Mont. & Chit. 149.

ACTIONS GENERALLY.

See also ASSIGNEES, *Actions and Suits, &c.*

1. The wife of an uncertificated bankrupt is not a competent witness, in an action by the assignees, to prove a payment by the bankrupt to the defendant after bankruptcy. *Williams v. Williams*, 8 Dowl. Pr. Ca. 220.

2. Where, in trover by the assignees of a bankrupt, issues were taken on the plaintiffs being possessed as of the property as assignee, and on the estate of the bankrupt having paid 15s. in the pound under a second commission, and the defendant succeeded on the first issue, and it appeared that the plaintiff, as assignee under the second commission, had allowed the bankrupt to have the goods in his order and disposition; the defendant was held to be entitled to the costs of proving a third commission, but not to those of proving that the bankrupt's estate produced 15s. in the pound after the certificate being granted under the second commission. The cause was conducted by a clerk to a firm of two attorneys, and one of the firm having attended at the trial as a witness, it was held that the costs of his attendance were rightly allowed. *Butler v. Hobson*, 6 Dowl. Prac. Ca. 157.

ACTIONS.

Plea.

1. In trover by the assignee of a bankrupt, a plea that the plaintiff was not assignee of the estate and effects of the bankrupt, according to the statutes concerning bankrupts in manner and form, as in the declaration alleged, puts in issue the requisites to support the fiat. *Butler v. Hobson*, 5 Scott, 798. S. C. 5 Bing. N. C. 128.

Parties to.

2. The plaintiffs, who had been chosen assignees of a bankrupt, issued a scire facias to 'revive' a judgment obtained by him before bankruptcy against the defendant, but omitted to make the official assignee a co-plaintiff. The Court, after plea pleaded and issue joined, allowed the proceedings to be amended by joining the official assignee, and held also, that in cases of such amendment, the opposite party should always be allowed to plead *de novo*. *Holland v. Phillips*, 2 Per. & D. 336.

3. In assumpsit by the directors of a joint stock company, constituted by deed, the deed must be produced, to shew who are the directors; and it is not sufficient to shew that the plaintiffs are the persons acting as directors. A director who has become bankrupt must nevertheless be joined as plaintiff, even though he has ceased to act, unless it be shewn that he has vacated his office. *Phelps v. Lyle*, 2 Per. & D. 314.

Actions, Evidence on.

4. Depositions made by a witness sent by the petitioning creditor to prove an act of bankruptcy before

ACTIONS, EVIDENCE ON—
continued.

the commissioners, are admissible in evidence against the petitioning creditor in any subsequent action against him, although the witness is still living. *Gardner v. Moulton*, 2 Per. & D. 403.

5. The fact that after a fiat had been sued out, certain creditors of the bankrupt delivered up to the assignees, goods which they had received from the bankrupt before the fiat, and before the delivery of certain goods by the bankrupt to defendant: Held, not admissible evidence against defendant in an action of trover brought against him by the assignees. *Backhouse v. Jones*, 6 Bing. N. C. 65. S. C. 8 Scott, 148.

6. Plaintiff, at the recommendation of B., sent goods to a dyer, who was told by plaintiff's son that B. would give directions about them: B. called and gave directions, and afterwards became bankrupt: in trover for these goods, brought by plaintiff against B.'s assignees: Held, that the directions given by B. were admissible in evidence for the assignees. *Sharp v. Newsholme*, 5 Bing. N. C. 713. S. C. 8 Scott, 21.

7. A written paper containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previous to the bankruptcy, shewing a balance due to the creditor is *prima facie* evidence, as against the assignees in an action brought by them against the creditor, that it was written at the time it bore date: Semble, that such a document is evidence of payment, and not a set-off, and ought to be pleaded as such. *Sinclair v. Bagdaley*, 4 Mees. & Wels. 312.

8. In an action against a sheriff for a false return of *nulla bona* to a writ of *fieri facias*, in which the question is, whether the goods of the debtor had passed to his assignees under this bankruptcy, the defendant need not put in the deposition of the petitioning creditor to shew what the petitioning creditor's debt was: nor is the defendant limited to the debt only, which is stated in the deposition of the petitioning creditor. *Birt v. Stephenson*, 8 Car. & P. 741.

9. In an action by the assignees of a bankrupt for money had and received, against a sheriff who has sold the goods of the bankrupt under an execution, and paid over the proceeds after notice of an alleged act of bankruptcy, the sheriff's officer who acted in the execution (if he has given the usual indemnity bond to the sheriff) is not a competent witness for the defendant, under the statute 3 & 4 W. 4. c. 42. s. 26. *Groom v. Bradley*, 8 Car. & P. 500.

10. The protection given by the stat. 2 & 3 Vict. c. 29. s. 1. to contracts with bankrupts and executions against their property *bona fide* executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. Semble, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Byers v. Southwell*, 9 Car. & P. 320.

ACTUS DEI.

A joint fiat issued, and one of the bankrupts died before adjudication. *Semble*, it becomes absolutely void. Secondly, another petitioner applied for a separate fiat on fresh docket papers, and on the same day the original petitioning creditor applied for a separate fiat on amended papers. Held, that the original petitioning creditor was entitled to the fiat; the joint one being rendered defective by act of God only, and through no fault of the petitioning creditor. Costs of second petitioning creditor refused. *Quære* as to power of Lord Chancellor to render a joint fiat effective as to one bankrupt only. *Ex parte* and *re Norris*, Mont. & Chit. 157.

ADJOURNMENT.

See PETITION STANDING OVER.

ADJUDICATION.

1. Petition that bankrupt might be at liberty to attend adjudication by counsel, refused; but petition retained, with stay of advertisement, if bankruptcy adjudged, and petitioner to apply *instante* for supersedeas. *Ex parte* and *re Foulkes*, Mont. & Chit. 68.

2. A joint fiat issued, and one of the bankrupts died before adjudication. *Semble*, it becomes absolutely void. *Ex parte* and *re Norris*, Mont. & Chit. 157.

3. *Quære*, whether, on a legal objection, the alleged bankrupt can come, before adjudication, to supersede the fiat? *Ex parte* and *re Brown*, Mont. & Chit. 231.

4. The affidavit, dated 22d April (1839) under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.* and upwards," on bills of exchange as due to A. the "deponent, and B. and C. his late partners." The notice and requisition to pay (dated the 24th April) was in respect of a debt of 361*l.*, but intended as the same and the real debt, and was signed by A. for B. and C. and himself. On the 24th April, A. filed another affidavit, swearing the debt to be 361*l.* "upon bills of exchange;" and on the 2d May, "A. and B. for themselves and C." gave a corresponding notice. The commissioner approved a bond for 200*l.* as security under the first affidavit, although he had notice that the real debt was the 361*l.* On the 3d June, A., B., and C. issued a fiat on the alleged act of bankruptcy by not having given security under the second affidavit and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the 8th section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat; and the petitioning creditor's affidavit on striking the docket stated the debt to be due "for goods sold and delivered:" Held, there were not sufficient objections to warrant the staying the advertisement in the *Gazette*. And upon the question of supersedeas, *quære*, whether these, or any of them, are sufficient grounds for superseding. Per Sir G. Rose. The proof of the act of bankruptcy by the solicitor to the fiat is sufficiently bad to induce the Court to send the question to be tried by action at law. *Ex parte* and *re Rhodes*, Mont. & Chit. 319.

ADVERTISEMENT.

See STAYING ADVERTISEMENT.

AFFIDAVIT OF SERVICE AND GENERALLY.

1. If a petitioner has not his affidavit of service in Court, the petition can only stand over generally. In re *Crossley*, Mont. & Chit. 93.

2. The affidavit of debt, under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was not filed till after the notice, (required by that section) of its being filed, was served. The twenty-one days from the filing of the affidavit had not expired: Held, that, as the creditor might still give a fresh notice, the debtor could not take the affidavit off the file, though the Court had jurisdiction so to order: Held, a motion is the proper form of application for that purpose. Ex parte and re *Gibson*, Mont. & Chit. 255.

3. Where, on petition to appoint trustee in place of bankrupt, usual reference is dispensed with, affidavit must be made of party's fitness and respectability. Ex parte *Palmer*, re *Peach*, Mont. & Chit. 364.

4. The mere circumstance of a petition being ordered to stand over on the application of a party, does not prevent that party from filing fresh affidavits. Ex parte *Worthington*, re *Oulton*, 3 Dea. 332.

5. A party, having been committed for contempt, for disobedience to an order of this Court, requiring him to pay certain costs awarded against him by a previous order of the Lord Chancellor in this matter, petitions the Court of Review for his discharge, on the following grounds:—1. That this Court had no jurisdiction to deal with any order of the Lord Chancellor, as for a contempt.

2. That the affidavit in support of the petition, on which the order for commitment was obtained, was sworn before the petition was presented. 3. That the order for commitment, in the wording of it, appeared to have been made on the "intention" of the party applying for it, instead of on the petition of such party: Held, that these were not sufficient objections to the validity of the commitment. Ex parte *Green*, re *Elgie*, 3 Dea. 700.

AFFIDAVIT OF DEBT.

1. The Court will not order a second amended affidavit under the 1 & 2 Vict. c. 110. s. 8. for the same debt, to be taken off the file. Ex parte and re *Rhodes*, Mont. & Chit. 149.

2. Quære, Whether an affidavit of debt under 1 & 2 Vict. c. 110. s. 8. need state the consideration. Ex parte and re *Brown*, Mont. & Chit. 196.

3. Quære, Whether an affidavit of debt, under the statute 1 & 2 Vict. c. 110. s. 8., is defective if it depose to a debt greater than the creditor can establish to be due. S. C. id. 198.

4. The affidavit of debt, under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was not filed till after the notice (required by that section) of its being filed, was served. The twenty-one days from the filing of the affidavit had not expired: Held that, as the creditor might still give a fresh notice, the debtor could not take the affidavit off the file, though the Court had jurisdiction so to order: Held, a motion is the proper form of application for that purpose. Ex parte and re *Gibson*, Mont. & Chit. 255.

AFFIDAVIT OF DEBT—
continued.

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tried by action at law. Ex parte and re *Rhodes*, Mont. & Chit. 319.

6. It is sufficient if the affidavit of debt under the 1 & 2 Vict. c. 110. s. 8. is sworn before a Master Extraordinary. It may be sworn by an agent duly authorised. It may be filed with the Registrar of the Court of Bankruptcy. It need not be entitled in any Court, or in any matter. Per Sir G. Rose. An affidavit of debt, under the 1 & 2 Vict. c. 110. s. 8. is to be looked upon as strictly analogous to an affidavit to hold to bail, and as a substitute for it; and not as process tending to a fiat. See the affidavit of debt under the 1 & 2 Vict. c. 110. s. 8., antè, 375.: Held, that it showed sufficiently that the registered officer was duly appointed and authorised to make it, and that the company was established, and carrying on business according to the provisions of the 7 Geo. 4. c. 6. Dissent. Sir J. Cross. Ex parte and re *Hall*, Mont. & Chit. 365, 366.

AGREEMENT AND CON-
TRACT.

1. Goods sent to broker for sale, he sells, according to sold note, ostensibly to A. B., but secretly, and according to bought note, to A. B. and self. A. B. insolvent, broker bankrupt, and at the time of bankruptcy goods remain in his possession: Held, contract void, and that owner might reclaim them specifically. Ex parte *Huth*, re *Pemberton*, Mont. & Chit. 667.

2. Defendant, subject to the approval of a meeting of creditors, agreed to pay plaintiffs, assignees of B., a bankrupt, 201*l.*, supposed to be equal to 10*s.* in the pound, upon all debts then proved; the fiat was to be worked in the usual way: a

AGREEMENT AND CONTRACT—*continued.*

claim of defendants of 700*l.* was to be allowed in full; the assignees to pay the cost of the bankruptcy; the surplus of the estate to be divided among the creditors; but the dividends of those who had previously received 10*s.* in the pound were to be paid over to defendant, and the excess beyond 10*s.* in the pound to belong to the creditors: Held, that this agreement was void, as contrary to the policy of the bankrupt law. *Staines v. Wainwright*, 6 Bing. N. C. 174.

3. 1. In an action by plaintiffs, as assignees of O., a bankrupt, against defendant, for non-performance of a contract, the issue raised was, whether O. and plaintiffs, as his assignees, had been always ready and willing to perform it: Held, that the bankruptcy and insolvency of O., and the insufficiency of his assets, were circumstances from which the jury might properly infer that he and his assignees had not been ready and willing. 2. The contract was to be performed on the 1st July, 1835; and another issue was, whether plaintiff had abandoned it: Held, that they were bound to make their election, within a reasonable time; and that as they had taken no decisive step till January, 1838, the jury might properly infer they had abandoned the contract. *Lawrence v. Knowles*, 5 Bing. N. C. 399. S. C. 7 Scott, 381.

4. B., a builder, contracted with A. and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work

within certain specified periods, being paid by instalments at corresponding dates; and that if he should neglect to complete any portion within the time limited, he should forfeit and pay the sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (inter alia) B. should become bankrupt, to take possession of the work already done by him, and to put an end to the agreement, which should be altogether null and void, and that the trustees, in such case, should pay B. or his assignees only so much money as the architect of the company should adjudicate to be the value of the work actually done and fixed by B. as compared with the whole work to be done. The course of business during the progress of the work, was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works had proceeded some time, B. became bankrupt. Before his bankruptcy, certain wooden sash-frames had been delivered by him, on the premises of the company, approved by the clerk of the works, and returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees; and the sash-frames being afterwards demanded of them, by B.'s assignees, they gave an unqualified refusal to deliver them up: Held, 1st, That the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy. 2dly, That they were not entitled to retain them under the agreement, as being work already

AGREEMENT AND CON-
TRACT—*continued.*

done, they not having been fixed to the hotel; but that even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy. 3dly, That the refusal of the trustees not having been limited to the pulleys, the demand and refusal were sufficient evidence of a conversion by them, of the wooden sash-frames, so as to entitle B.'s assignees to recover them in trover. *Tripp v. Armitage*, 4 Mees. & Wels. 687.

AGREEMENT OF COURT.

If parties agree upon an order out of court, the Court cannot decide the question of costs between them without opening the whole case. Ex parte *Bate*, re *Gough*, Mont. & Chit. 58.

AMENDMENT.

See also PETITION, *Amending.*

1. Petitioning creditor's bond amended. In re *Dulcken*, Mont. & Chit. 73.

2. State of facts before Registrar cannot be amended. Registrar's report must be first made. Re *Turner*, id. ib.

3. Bankrupt trading at Coventry in his sole name, and in London as "A. & Co." Docket struck describing him as of Coventry only; another docket struck describing him of both places, but of London as "A. and Son:" Held, latter docket

should be preferred, but without prejudice to any other creditor. Leave to amend docket papers. If first petitioning creditor was ignorant of both places of trading, costs given him out of estate. Ex parte *Gaury*, re *Walter*, Mont. & Chit. 679.

4. The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. In re *Lees*, 3 Dea. 36.

ANNULLING.

See FIAT, *Superseding.*

ANNUITY.

1. The bankrupt granted an annuity of 42*l.* in consideration of 400*l.*, and received the whole of the consideration money through the medium of the attorney employed by him in the transaction. Half an hour afterwards, at a different place, he repaid 100*l.* of this sum to the attorney in discharge of a debt: Held, that this was not a return or retainer of part of the consideration money, within the provisions of the annuity act, and that the value of the annuity was proveable under the fiat. Ex parte *Bogue*, re *Basun*, 3 Dea. 314.

APPEAL.

Leave given by the Lord Chancellor to appeal to the House of Lords. Ex parte *Pollard*, re *Courtney*, Mont. & Chit. 253.

2. Semble, the 1 & 2 W. 4. c. 56. s. 32., limiting the time of appeal to

APPEAL—*continued.*

the Lord Chancellor, does not prevent the Court of Review re-hearing a case decided by them, although nine months had since elapsed. *Ex parte Whitmore*, 3 Mont. & Ayr. 627., confirmed on a re-hearing, further evidence being admitted. *Ex parte Jackson*, re *Warwick*, Mont. & Chit. 263.

3. *Quære*, whether there is any mode of appealing from the shape in which a special case is settled by the Court of Review? Where the Court of Review supersedes a fiat, the Lord Chancellor cannot order a procedendo without examining merits of order of the Court of Review; ergo, without an appeal. In re *Hall*, Mont. & Chit. 489.

4. *Ex parte Keys*, 3 Dea. & Chit. 263., 1 M. & A. 226., commented on. Contrary to Lord Brougham, in *Ex parte Keys*, *suprà*, Lord Cottenham refused to make an order to hear a matter by way of appeal from the Court of Review upon petition, or otherwise than by special case, and to leave the respondents to apply to discharge the order. *Ex parte Stubbs*, re *Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

5. Where, from a judgment of the Lord Chancellor on a special case, leave had been given to appeal to the House of Lords three months back, and no steps had been taken towards prosecuting the appeal, and no application made to stay proceedings, *quære*, whether the Court of Review is justified in refusing to make directions consequential on the Lord Chancellor's judgment. Party obtaining leave to appeal ordered to elect within a given time, whether he would proceed with it or not. *Ex parte Pollard*, re *Courtney*, Mont & Chit. 643.

APPRENTICE.

See also ARTICLED CLERK.

A fiat of bankruptcy issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bankrupt and his creditors: Held, that the indentures of apprenticeship were discharged. *Allen v. Coster*, 1 Beavan, 274.

APPROPRIATION.

See SPECIFIC APPROPRIATION.

ARBITRATION AND AWARD.

An action having been brought to recover damages for a breach of an agreement, by which the defendant covenanted to purchase an estate of the plaintiff, for which he was to pay a large sum by instalments, and secure the remainder by an annuity, chargeable upon certain property of sufficient value, a verdict was taken at nisi prius for 10,000*l.*, subject to a reference of the cause, and all matters in difference; 3500*l.* to be paid by the defendant into the hands of the arbitrator, to be paid as the latter thought fit, and the arbitrator to order what should be done in the action. The arbitrator awarded, that the plaintiff was entitled to have a verdict entered for him on the several issues in the cause, and that he had sustained damage, by reason of the premises in the pleadings mentioned, and the matters in difference, to the amount of 6067*l.*, and he then awarded that the 3500*l.* should be paid to the plaintiff, together with a further sum of 2567*l.*, the balance of such damages on all the causes of action: Held, that this award, although it did not distinguish the

ARBITRATION AND AWARD
—continued.

amount awarded in respect of the action, from that upon the matters in difference, and although it awarded a gross sum, including the value of the annuity, was good: Held also, that the bankruptcy of the defendant, before the making of the award, was not a ground for setting aside the award. *Semble*, that the bankruptcy did not operate as a revocation of the submission to reference. *Taylor v. Shuttleworth*, 8 Dowl. Pr. Ca. 281.

ARMY.

The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

ARTICLED CLERK.

An articulated clerk to an attorney and solicitor is not an apprentice, within the meaning of the 49th section of the bankrupt act, 6 G. 4. c. 16. *Ex parte Prideaux*, re *Bush*, 3 Myl. & C. 927.

ASSIGNOR AND ASSIGNEE,
AND ASSIGNMENT GENERALLY.

1. A. appeared by the return under the joint stock banking act, 7 G. 4. c. 46., to be a shareholder up to November, 1838. He then agreed to assign his shares to B., who was appointed by the company a director in respect of those shares. In February, 1839, the company indorse bills to petitioners. No new return is made under the 8th section, and not till March is the deed of trans-

fer executed between A. and B.: Held, that A. continued a partner to the world until March, and therefore liable, under the proviso in the 1st section, to payment of the bills. Proof against A.'s estate admitted. *Ex parte Prescott*, re *Phillips*, Mont. & Chit. 611.

2. A creditor of a bankrupt's estate, who has sold his debt, is a competent witness in support of the fiat. *Pulling v. Meredith*, 8 Car. & P. 763.

3. A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C., as a security for a debt; C. gave notice of the assignment to A., but not to B. The owner having subsequently become bankrupt, it was held that the arrears of freight were not in his order and disposition at the time of his bankruptcy. Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Myl. & Cr. 129.

4. A. demised a house and lands to B., and afterwards, being embarrassed, assigned the premises and all his personal estate to C. A. told B. that he had assigned the premises, and requested him to give C. an acknowledgment, whereupon B. gave C. a shilling, and subsequently agreed with C. to give up possession to him of the house and lands respectively at the usual times, receiving an allowance for his improve-

**ASSIGNOR AND ASSIGNEE,
AND ASSIGNMENT GENERALLY**—*continued.*

ments. Afterwards, and while the premises were still in B.'s occupation, A. became bankrupt, and C. brought ejectment. The assignees under A.'s commission defended as landlords, and contended that the assignment to C. was invalid, A. having become bankrupt when he made it: Held, that the acknowledgments above mentioned did not estop B., or the assignees, as representing him, from contesting C.'s title on the above ground; such acknowledgments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment invalid. Before Lord Denman C. J., Patteson, Williams, and Coleridge, Js. Doe dem. *Plevin* against *Brown*, 7 Adol. & Ell. 447. S. C. 2 Nev. & Per. 592.

**ASSIGNEES OF BANKRUPT
GENERALLY.**

See also OFFICIAL ASSIGNEES.

1. The certificate will be allowed, if the petition to stay it, charging the assignee with fraud in obtaining the allowance, is not served on the assignees. Ex parte *May*, re *Malachy*, Mont. & Chit. 18.

2. When the creditor of the principal is sole assignee under a commission against the surety, and petitions for sale of the mortgaged property, a person must be appointed to protect the interests of the surety. Ex parte *Haines*, re *Barnett*, Mont. & Chit. 32.

3. A casual conversation is sufficient notice to prevent reputed ownership. The Court will restrain assignees from proceeding at law

to invalidate transfer of shares by virtue of reputed ownership. Ex parte and re *Richardson*, Mont. & Chit. 43.

4. Assignee elected by mistake under his own power may remove himself on paying costs. Ex parte *Hammond*, re *West*, Mont. & Chit. 74.

5. Arrangement between bankrupt and assignees entered into out of Court, sanctioned by the Court. Ex parte and re *Goldney*, Mont. & Chit. 90.

6. Unclaimed dividends in hands of executor of surviving assignee ordered into Court; but new assignees must be appointed before the executor will be released. Ex parte *Raikes*, re *Tuke*, Mont. & Chit. 96.

7. A petition by one assignee to tax a bill, must be served on the other assignees. Ex parte *Farbrooke*, re *Fisher*, Mont. & Chit. 176.

8. Assignees being ordered by the commissioners to pay the solicitor's bill, that bill, though settled by them, may be taxed, and it is not to be treated as a settled account. One assignee, stating himself to be also a creditor, may petition for this purpose, though the other assignees object to re-taxation. S. C. id. 290.

9. Petition of three trustees, to prove against a bankrupt, fourth, contained charges of breach of trust, and prayed consequential directions: Held, Court could only make the common order to prove. Assignees served entitled to costs of resisting the entire application. Ex parte *Smith*, re *Clark*, Mont. & Chit. 347.

10. Assignees under a fiat superseded for fraud cannot have his costs of appearing from the petitioning creditor. Ex parte *Caldecott*, re *Heath*, Mont. & Chit. 600.

11. The bankrupt and his surety entered into an agreement with the assignees to pay all the creditors

ASSIGNEES OF BANKRUPT GENERALLY—*continued.*

20s. in the pound, in consideration of which they agreed that the fiat should be annulled. In pursuance of this agreement, 10s. in the pound was paid, and the assignees had a fund sufficient to pay the remainder; but were, nevertheless, proceeding to sell certain property of the bankrupt. On a petition by the bankrupt to restrain them from so doing, the Court declined to make any order, as the requisitions of the composition contract clause had not been complied with. *Ex parte and re Nainby*, 3 Dea. 587.

12. A party, on his examination before the commissioners, was compelled by them to produce a book, which was lawfully in his possession, and which, on being produced, the assignees laid their hands on, and refused to return. The Court, without entering into the question as to who had the legal title to the book, ordered it to be delivered up to the party who had the lawful possession of it when it was produced before the commissioners. *Ex parte Gilbard, re Malachy*, 3 Dea. 488.

13. When an assignee was chosen, without his authority, and declined to act, the costs of a new choice were ordered to come out of the estate. *Ex parte Pearson, re Stephenson*, 3 Dea. 324. S. C. nom. *Ex parte Stephenson, re Balchern*, 3 M. & Ayr. 663.

14. A. demised to B. (who was alleged to be an uncertificated bankrupt) a wharf with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance: Held, that neither A. nor the occupiers of the adjoining wharfs, nor the assignees

of B., were necessary parties to the bill. *Semple v. The London and Birmingham Railway Company*, 9 Sim. 209.

15. The Court has power, independently of the 2 Geo. 3. c. 23. s. 23., to order an attorney to deliver a signed bill of costs; and if the client becomes bankrupt, his right in that respect vests in his assignees. *Clarkson v. Parker*, 6 Dowl. Prac. Ca. 87.

ASSIGNEES, ACTIONS AND SUITS BY AND AGAINST.

1. Where a suit is instituted by assignees, the Court will not stop it for the want of the creditors' consent, but referred it to commissioners to inquire what funds it would be proper to retain in order to carry it on. Assignees in this case proceed at the peril of costs. *Ex parte May, re Jones*, Mont. & Chit. 285.

2. Where a sole plaintiff becomes bankrupt, and the defendant wishes to speed the cause, although he can obtain no direct order against the assignees to continue the suit, he may move that, unless they file a supplemental bill within a given time, the suit shall be dismissed. *Holt v. Hardcastle*, 3 You. & Coll. 230.

3. The official assignee of a bankrupt's estate filed a bill against the respective personal representatives of two successive assignees, for an account and payment of moneys which, having formed part of the bankrupt assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The moneys consisted partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both

ASSIGNEES, ACTIONS AND
SUITS BY AND AGAINST—
continued.

the assignees died before the passing of the 6 G. 4. c. 16. The bill was filed in 1834, and in the following year the 5 & 6 W. 4. c. 16. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified: Held, that the official assignee was competent to maintain such a suit, and that the particular creditors to whom the unclaimed dividends had been allotted, and the Attorney General, were not necessary parties to it. *Green v. Weston*, 3 Myl. & Cr. 385.

4. The institution of a suit under sect. 88. of the bankrupt act, 6 G. 4. c. 16., may be authorised by creditors present by attorney as effectually as by creditors present in person. *Bannatyne v. Leader*, 3 Myl. & Cr. 379.

5. In trover by assignees of a bankrupt, laying the possession in themselves as assignees, pleas that the plaintiffs were not assignees, and were not possessed as assignees, put in issue the trading, the petitioning creditor's debt, and the act of bankruptcy; and these must be proved, if notice to dispute them be given. It is not enough to prove the fiat and assignment to the plaintiffs. *Buckton against Frost*, 8 Adol. & Ell. 844. S. C. 1 Per. & D. 102.

ASSIGNMENT, WHAT PASSES.

See also REPUTED OWNERSHIP.

1. Effect of bankruptcy on clause of forfeiture of an estate. If, at the time of the bankruptcy, the bankrupt has a life interest in certain

premises, expectant upon the death of the tenant for life, and there is a proviso that the person who is entitled to the use and occupancy of the premises shall reside and dwell therein and assume the name of the donor, and upon his neglect or refusal to comply with these conditions shall be considered as dead, and the grant as to him be void, and be for the person next entitled thereto; and if, after the bankrupt obtain his certificate, the tenant for life die, the estate passes to the assignees. *Ex parte and re Goldney*, Mont. & Chit. 75.

2. In computing the "two calendar months" under the 1 & 2 Vict. c. 110. s. 8., the day on which the affidavit of debt was filed must be included. Therefore, where affidavit was filed on the 27th April, and the fiat (though earlier in the day) issued on the 27th June, held too late, and fiat annulled. Return of goods by hirer to lender under threat of fiat in bankruptcy, *Semble*, not an act of bankruptcy as a fraudulent preference. *Ex parte and re Whitby*, Mont. & Chit. 671.

3. S., being sued by defendant, paid money into Court in lieu of bail, on the 13th of September; having omitted to put in bail, or pay the additional sum required as security for costs, the Court ordered the money to be paid to defendant on the 23d September; on the 9th S. had committed an act of bankruptcy, and on the 28th a fiat was issued against him: Held, that his assignees could not recover from defendant the money so paid him by order of the Court. *Reynolds v. Wedd*, 4 Bing. N. C. 694.

4. Under a plea that the plaintiff was not possessed as of his own property, as assignee of the chattels in question, it appeared that the plain-

ASSIGNMENT, WHAT PASSES
—continued.

tiff claimed as assignee under a second commission, under which the bankrupt had obtained his certificate, but his estate had not produced sufficient to pay 15s. in the pound: Held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to show, in answer to the plaintiff's claim, that the goods (after acquired property) had been suffered to remain in the order and disposition of the bankrupt by the consent and permission of the true owner, and therefore passed under the 7 Geo. 4. c. 57. s. 30. to the assignees of the Insolvent Debtors Court, the bankrupt having taken the benefit of that act. *Butler v. Hobson*, 5 Scott, 798. S. C. 5 Bing. 128.

5. To an action for money had and received, it is a good plea (under stat. 6 Geo. 4. c. 16. s. 127.) that plaintiff became bankrupt and obtained his certificate in 1822: that a second commission issued against him, May 20th, 1825, under which his effects were assigned, in July, 1825, and he obtained his certificate in 1826, but did not pay 15s. in the pound, whereby, and by force of the statute, the debt demanded in the declaration hath vested in the assignees. Stat. 6 Geo. 4. c. 16. s. 127. (September 1. 1835) operates in such a case retrospectively. Where the estate of a bankrupt after certificate is vested in the assignees by stat. 6 Geo. 4. c. 16. s. 127., he cannot sue for an after-accruing debt though the assignees do not interpose. *Young v. Rishworth*, 8 Adol. & Ell. 470. S. C. 3 Nev. & Per. 585.

6. A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to
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assignees under a fiat against him, although the assignment is expressed to be "for further security," and contains a proviso to defeat it on payment of the debt. *Dangerfield v. Thomas*, 9 Adol. & Ell. 292. S. C. 1 Per. & D. 287.

7. The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

8. B., a builder, contracted with A. and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates; and that if he should neglect to complete any portion within the time limited he should forfeit and pay the sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (inter alia) B. should become bankrupt, to take possession of the work already done by him, and to put an end to the agreement, which should be altogether null and void, and that the trustees in such case should pay B. or his assignees only so much money as the architect of the company should adjudge to be the value of the work actually done and fixed by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works had proceeded some time, B. became bankrupt. Before his bankruptcy, certain
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ASSIGNMENT, WHAT PASSES —continued.

wooden sash-frames had been delivered by him, on the premises of the company, approved by the clerk of the works, and returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees; and the sash-frames being afterwards demanded of them by B.'s assignees, they gave an unqualified refusal to deliver them up.

Held, 1st, that the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy.

2dly, That they were not entitled to retain them under the agreement, as being work already done, they not having been fixed to the hotel; but that, even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy.

3dly, That the refusal of the trustees not having been limited to the pulleys, the demand and refusal were sufficient evidence of a conversion by them of the wooden sash-frames, so as to entitle B.'s assignees to recover them in trover. *Tripp v. Armitage*, 4 Mees. & Wels. 687.

9. On the 6th July, an execution was levied on the goods of A. On the 19th of the same month the 2 & 3 Vict. c. 29. came into operation, and a few days afterwards a fiat of bankruptcy issued against A. upon an act of bankruptcy committed be-

fore the levy: Held, that the act rendered the execution valid, and that the assignees were not entitled to the property. *Edwards v. Lawley*, 8 Dowl. Pr. Ca. 234.

BANK OF ENGLAND.

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court, on a bill filed by the assignees against the Bank of England, ordered the Bank to erase from their books the fictitious name, and insert that of the bankrupt. *Green v. Bank of England*, 3 You. & Coll. 722.

BANKRUPT EXECUTOR AND TRUSTEE.

1. Upon the bankruptcy of an executor the Court will secure the fund, but has not jurisdiction to direct payment to the several creditors of the testator. *Ex parte Williams, re Knight*, Mont. & Chit. 91.

2. Mode of proving against a bankrupt trustee and agent. *Ex parte* and *re Forrester*, Mont. & Chit. 143.

3. Mode of proof by bankrupt executor. *Ex parte Collingdon, re Anderson*, Mont. & Chit. 156.

4. Bankrupt trustee allowed to prove, but not to receive trust dividends. *Ex parte Strettell, re Raikes*, Mont. & Chit. 165.

5. On petition to declare bankrupt a trustee, and for conveyance of mortgaged premises, neither the assignees, bankrupts, nor heir of mortgagor need be served. Being served, the petitioner must pay their costs. *Ex parte Smith, re Parker*, Mont. & Chit. 598.

6. The bankruptcy of a trustee is a sufficient ground for his removal

BANKRUPT EXECUTOR AND TRUSTEE — continued.

from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver. *Bainbrigge v. Blair*, 1 Beavan, 495.

BANKRUPT PLAINTIFF.

After verdict in favour of the plaintiff, and a rule for a new trial made absolute, he became bankrupt, and the Court compelled him to give security for costs, although there was no affidavit that the action was carried on for the benefit of the assignees. *Denton v. Williams*, 8 Dowl. Pr. Ca. 123.

BANKRUPT'S WIFE.

Bankrupt's wife admitted to prove. *Ex parte Thring*, Mont. & Chit. 75.

Generally Bankrupt.

1. Quære, as to a mandatory order on bankrupt to perform conditions in a deed of settlement, so as to preserve the interest of the assignees. *Ex parte and re Goldney*, Mont. & Chit. 90.

2. Petition to expunge proof by a bankrupt must shew that the surplus or amount of his allowance will be affected. Leave to amend. *Ex parte and re Pitchforth*, Mont. & Chit. 96.

3. Where a bankrupt petitioning to supersede for want of requisites to support fiat, has applied for copies, and seen the proceedings, the onus probandi of his case lies on him, and it is not sufficient to deny the requisites generally; and without his doing so, the respondent may rely on the proceedings alone. *Ex parte and re Ford*, Mont. & Chit. 97.

4. A bankrupt cannot be heard on a petition to prove pro: or con: and if served must be paid his costs of appearance. *Ex parte Fairman*, re *Lloyd*, Mont. & Chit. 125.

5. A., B., and C. partners: A. bankrupt; B. bankrupt; A., B., and C. bankrupts. Under the separate fiats, part of the joint estate had been administered, and a dividend declared. No separate estates, or debts. Order to incorporate the separate under the joint fiat, and to stay proceedings thereunder, and liberty to review the choice of assignees. Bankrupts need not be served with petition for this purpose. *Ex parte Lister*, re *Haddon*, Mont. and Chit. 260.

6. After issue joined in a foreclosure suit, the plaintiff discovered that, prior to the creation of his mortgage security, the defendant, the mortgagor, had become bankrupt, whereupon the Court gave the plaintiff leave to amend his bill by making the assignees defendants, the bankrupt still being retained as a defendant on the record. *Hanson v. Preston*, 3 You. & Coll. 229.

7. In assumpsit by the directors of a joint stock company, constituted by deed, the deed must be produced, to show who are the directors; and it is not sufficient to shew that the plaintiffs are the persons acting as directors. A director who has become bankrupt, must nevertheless be joined as plaintiff, even though he has ceased to act, unless it be shewn that he has vacated his office. *Phelps v. Lyle*, 2 Per. & D. 314.

Powers, Rights, Liability, &c.

1. To an action for money had and received, it is a good plea (under stat. 6 G. 4. c. 16. s. 127.), that plaintiff became bankrupt and obtained his certificate in 1822; that a second commission issued against him, May

BANKRUPT'S POWERS— *continued.*

20th, 1825, under which his effects were assigned in July, 1825, and he obtained his certificate in 1826, but did not pay 15s. in the pound, whereby, and by force of the statute, the debt demanded in the declaration hath vested in the assignees. Stat. 6 G. 4. c. 16. s. 127. (September 1. 1835), operates in such a case retrospectively. Where the estate of a bankrupt after certificate is vested in the assignees by stat. 6 G. 4. c. 16. s. 127., he cannot sue for an after-accruing debt, though the assignees do not interpose. *Young v. Rishworth*, 8 Adol. & Ell. 470. S. C. 3 Nev. & Per. 585.

2. In an action brought by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt who had not obtained his certificate (but has released his assignees), is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy. *Williams v. Williams*, 6 Mees. & Wels. 170.

3. Plaintiff filed a bill and obtained an injunction to restrain the defendant from proceeding against her at law. Afterwards the plaintiff became bankrupt, and the defendant served her assignees with notice of a motion that they might file a supplemental bill within a certain time, or that the bill might be dismissed. No supplemental bill was filed, but the assignees consented to an order of dismissal. The plaintiff was not served with notice of the motion to dismiss; and, on that account, the order was discharged. *Vestris v. Hooper*, 8 Sim. 570.

4. The Court refused to compel the lessor of the plaintiff in an action

of ejectment to give security for costs, on the ground that he was an uncertificated bankrupt; it appearing that the assignees had declined to proceed with the action, and it being sworn that it was carried on solely for the bankrupt's benefit. *Doe d. Colnaghi v. Blick*, 5 Scott, 714.

5. A lessee under an unwritten contract reserving rent on 6th April, and 6th October, became bankrupt, and a fiat issued in March, the rent due in the previous October having been paid. Upon the assignees refusing to accept the premises, the bankrupt offered within fourteen days after his receiving notice of such refusal, and one day before 6th April, to deliver up possession to the lessor: Held, that, under stat. 6 G. 4. c. 16. s. 75., he was not liable in assumpsit for use and occupation to pay anything in respect of the time subsequent to 6th October. Where the bankrupt holds by an unwritten lease, offering possession is a delivery within sect. 75. *Slack v. Sharp*, 8 Adol. & Ell. 366.

6. The Court refused to order a plaintiff to give security for costs, on the ground that had been three times an insolvent and once a bankrupt, and was only suing as trustee for a third person. *Wray v. Brown*, 6 Bing. N. C. 271.

7. A. and B. were co-partners. A. retired, and B. took C. into partnership with him. That partnership was dissolved, and then B. became bankrupt: Held, that B. was not a good witness to prove an agreement alleged by A. to have been made with him by B. and C. to indemnify him against the debts of the first partnership. *Warren v. Taylor*, 8 Sim. 599.

Certificate of Bankrupt generally.

1. If the certificate do not disclose

BANKRUPT'S POWERS —
continued.

that it was signed after the last examination, it is defective. Per Sir J. Cross. But the Court can send it back to the commissioners to be set right. A creditor has no right to object to a certificate on the ground of such informality. Per Sir G. Rose. *Ex parte May*, in re *Malachy*, Mont. & Chit. 18.

2. The Court ought to exercise a discretion as to the certificate, upon which it decides, not ministerially, but judicially. Per Sir J. Cross. S. C. id. ib.

3. Quære, Whether a petition to stay a certificate holds good before the certificate has been allowed or signed? *Ex parte* and re *Stocken*, Mont. & Chit. 232.

4. An alteration in the date of the certificate is not fatal, but allowed to be explained by affidavit. *Ex parte* and re *Brown*, Mont. & Chit. 361.

5. Bankrupt having become lunatic, a next friend allowed to make the usual affidavit of absence of fraud, &c., in obtaining allowance by, and consent of, commissioners and creditors. *Ex parte* and re *Roberts*, Mont. & Chit. 653.

Certificate, Want of.

1. The wife of an uncertificated bankrupt is not a competent witness, in an action by the assignees, to prove a payment by the bankrupt to the defendant after bankruptcy. *Williams v. Williams*, 8 Dowl. Pr. Ca. 200.

Certificate — Effect of.

1. The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has ob-

tained his certificate, and the trust property is in the hands of a receiver. *Bainbrigge v. Blair*, 1 Beavan, 495.

Discharge.

Quære, Whether the Court of Review can, upon petition, order a prisoner to be discharged? *Ex parte* and re *James*, Mont. & Chit. 165.

Re-examination.

Upon an application by a bankrupt to be re-examined, the re-examination will be ordered; and if there are funds, the costs to be paid out of the estate. In re *Crosley*, Mont. & Chit. 40.

BILLS OF EXCHEQUER.

1. Deposition of debt against a bankrupt indorser of a bill, not shewing notice of dishonour of bill to have been given to him: Held, not defective, if commissioner be satisfied aliunde, or if it be the fact that notice was given. Quære, Whether any creditor can object to the informality of such deposition on a question of proof? *Ex parte Marston*, and *Ex parte Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

2. A foreign merchant remits bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds. The factor sells the bills, but before the receipt of the purchase-money becomes bankrupt, and dishonours the merchant's drafts for the amount: Held, that the merchant, and not the factor's assignees, were entitled to the proceeds of the bills, notwithstanding the bills had been indorsed both by the principal and the factor, and were sold by the

BILLS OF EXCHEQUER—
continued.

factor in his own name. Ex parte *Pauli*, 3 Dea. 169.

CALLS ON SHARES.

Money due for calls in respect of shares in a joint stock bank does not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder without an account first taken. Ex parte *Snape*, re *Ransford*, Mont. & Chit. 607.

CERTIFICATE, STAYING.

See also BANKRUPT'S CERTIFICATE—PETITION TO STAY CERTIFICATE.

1. In the case of an unsettled account, the certificate will not be stayed if the assignees swear that, in their belief, the balance is against the claimant, and it does not appear that he has done every thing that by him ought to be done to fix the balance. If the claimant has endeavoured to have the balance struck, and the assignees collude with the bankrupt, the certificate ought to be stayed. Per Sir J. Cross. *May*, in re *Malachy*, Mont. & Chit. 18.

2. Certificate cannot be stayed for misconduct anterior to the bankruptcy. Ex parte and re *Stocken*, Mont. & Chit. 232.

3. The Court will not stay the bankruptcy certificate, until the determination of an action brought by the petitioner against a third party, for the purpose of realising a portion of his debt, where the petitioner did not appear to have used due diligence in proving the remainder of his debt. Ex parte *Pheasant*, re *Sherwood*, 3 Dea. 625.

CERTIFICATE OF COMMISSIONERS.

See COMMISSIONERS' CERTIFICATE.

CHOSE IN ACTION.

1. A casual conversation is sufficient notice to prevent reputed ownership. The Court will restrain assignees from proceeding at law to invalidate transfer of shares by virtue of reputed ownership. Ex parte and re *Richardson*, Mont. & Chit. 43.

2. A creditor of a bankrupt's estate who has sold his debt, is a competent witness in support of the fiat. *Pulling v. Meredith*, 8 Car. & P. 763.

3. A., on the behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on the owner's behalf a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C., as a security for a debt; and C. gave notice of the assignment to A., but not to B. The owner subsequently became bankrupt: it was held, that the arrears of freight were not in his order and disposition at the time of his bankruptcy. Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Myl. & C. 129.

CLERK'S WAGES.

A clerk who had involuntarily quitted the bankrupt's service nine

CLERK'S WAGES — *continued.*

months previous to the fiat, through the approaching insolvency of the bankrupt and his decreasing business, the trade going on in the mean time, and he obtaining employment elsewhere: Held, not entitled to six months' wages in full, especially where he had allowed the first and final dividend to be declared before making his claim. Dubit. Sir G. Rose. Ex parte *Gee*, re *Sawer*, Mont. & Chit. 99.

CO-CONTRACTORS.

Difference between co-contractors and co-partners. Ex parte *Marston* and Ex parte *Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

COMMISSION IN AID.

Where proof of debt has been tendered, by affidavit, and commissioners are not satisfied, but require creditor to attend for examination, although she be very infirm, and old, and unable to travel, all this Court can do is to give a commission in aid to take examination at creditor's own residence. Ex parte *Shaw*, re *Kirkby*, Mont. & Chit. 624.

COMMISSIONERS.

When the Court makes an order, that a creditor shall be permitted to prove for a certain sum, the commissioner cannot decline to receive the proof until a private meeting has been called to inquire into the nature of the debt. Ex parte *Richardson*, re *Clagett*, 3 Dea. 377.

COMMISSIONER'S CERTIFICATE.

1. Upon an application to supersede under the composition clause, it is not necessary that the commissioner shall certify that no creditor to the amount of 30*l.* resides out of the jurisdiction, or that the assignees have assented. Ex parte *Butterworth*, re *Butterworth*, Mont. & Chit. 140.

2. Court will not act on a certificate of commissioners, made in 1828, without referring it back for their review. Ex parte *Marindin*, re *Marindin*, Mont. & Chit. 282.

COMMITMENT.

1. A party, having been committed for contempt for disobedience to an order of this Court, requiring him to pay certain costs awarded against him, by a previous order of the Lord Chancellor in this matter, petitions the Court of Review for his discharge, on the following grounds:—

1. That this Court had no jurisdiction to deal with any order of the Lord Chancellor, as for a contempt.
2. That the affidavit in support of the petition, on which the order for commitment was obtained, was sworn before the petition was presented.
3. That the order for commitment, in the wording of it, appeared to have been made on the "intention" of the party applying for it, instead of on the "petition" of such party: Held, that there were not sufficient objections to the validity of the commitment. Ex parte *Green*, re *Elgie*, 3 Dea. 700.

2. When costs are directed to be paid to A. or his solicitor, a personal demand by A. alone is sufficient to ground an application for a committal of the party, for non-payment of them. Re *Diack*, 3 Dea. 53.

COMPETITION FOR FIAT.

See FIAT, CONTEST FOR.

COMPOSITION CLAUSE.

The bankrupt, and his surety, entered into an agreement with the assignees to pay all the creditors 20s. in the pound, in consideration of which they agreed that the fiat should be annulled. In pursuance of this agreement, 10s. in the pound was paid, and the assignees had a fund sufficient to pay the remainder; but were, nevertheless, proceeding to sell certain property of the bankrupt. On a petition by the bankrupt to restrain them from so doing, the Court declined to make any order, as the requisitions of the composition contract clause had not been complied with. *Ex parte Nainby, re Nainby*, 3 Dea. 587.

CONCERTED FIAT.

See FIAT — VALIDITY.

CONDITIONS OF RESIDENCE, &c.

Semble, that conditions as to residence, &c., otherwise to forfeit the estate, are at an end upon bankruptcy. *Ex parte Goldney, re Goldney*, Mont. & Chit. 89.

CONSENT OF CREDITORS.

See also ACQUIESCENCE.

1. Where a suit is instituted by assignees, the Court will not stop it for the want of the creditor's consent, but referred it to commissioners to inquire what funds it would be proper to retain in order to carry it on. Assignees in this case pro-

ceed at the peril of costs. *Ex parte May, re Jones*, Mont. & Chit. 285.

2. The institution of a suit under sect. 88. of the bankrupt act, 6 G. 4. c. 16., may be authorised by creditors present by attorney as effectually as by creditors present in person. *Bannatyne v. Leader*, 3 Myl. & Cr. 379.

CONSENT ORDER.

Petition to supersede, charged that petitioning creditor's debt was composed of bill of costs of attorney in action. Petitioner contended, that through negligence cause was lost, and business useless, and that attorney agreed to take costs out of pocket only (see ante, p. 346.). Reference by consent to registrar to tax costs having regard to question of negligence, and to ascertain what due, and state special circumstances: Held, he ought to have considered the contract, and to have taxed accordingly, and that the order of reference so taken by consent was no waiver of the objection founded on the contract. *Ex parte Southall, re Southall*, Mont. & Chit. 656.

CONSIDERATION.

Declaration alleged, that, before the making of the promise, &c., defendant was indebted to J. in 200l. for money had and received; that a commission of bankrupt had issued against defendant; that, in consideration of the premises, and that J. would prove for the 200l. under the commission, defendant promised J. to pay him that sum in a few months; that J. proved, but the defendant did not pay. A verdict was given on this count for J.'s representative. Judgment arrested, on the ground that the count was

CONSIDERATION—*continued.*

founded on a promise without legal consideration; the Court refusing to presume that J., in proving for money had and received, had waived a tort. *Brealey v. Andrew*, 7 Adol. & Ell. 108.

CONTRACT.

See AGREEMENT.

CONVERSION.

A sheriff, before the passing of the 6 G. 4. c. 16., having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a fi. fa., but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving, however, his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy: Held by the Lords (Lord Denman diss.), that the assignees might maintain trover against the sheriff for the goods seized. *Semble*, that the receipt of poundage was evidence of a conversion by the sheriff. *Garland v. Carlisle*, 4 Clk. & Fin. 693. S. C. 11 Bli. N.S. 421.

COPIES.

Where an affidavit, in answer to a petition, referred to certain exhibits which did not appear to be mutual accounts or documents between the parties, the Court refused an application of the petitioner to have copies of them furnished to him before the hearing of the petition. *Ex parte* and *re Parr*, 3 Dea. 607.

COSTS.

1. Costs given on dismissing a petition to stay certificate, though one of the Judges differed in opinion from the rest of the Court. *Ex parte May*, in *re Malachy*, Mont. & Chit. 18.

2. Upon an application by a bankrupt to be re-examined, the re-examination will be ordered, and if there are funds, the costs to be paid out of the estate. In *re Crossley*, Mont. & Chit. 40.

3. If a petition for the sale of an equitable mortgage is rendered necessary from a mistaken view by the assignees of their rights, they can claim costs only out of the bankrupt's general estate. *Ex parte Bate*, *re Gough*, Mont. & Chit. 58.

4. As to the costs on motions regarding competition between two fiats:—Where nothing done under first, and second issues, the former fails, and the latter stands: where something done under first, but out of time, and second issues in ignorance of intention to proceed with first, the latter is maintained with costs to the second petitioning creditor: where the proceeding under the first is known to the second petitioning creditor, no costs to the latter; and where known, and intention to proceed with first has been delayed or frustrated by second petitioner, the latter must pay costs of a refused motion to supersede first. In *re Wood*, Mont. & Chit. 69.

5. A bankrupt cannot be heard on a petition to prove pro: or con: and if served must be paid his costs of appearance. *Ex parte Fairman*, *re Lloyd*, Mont. & Chit. 125.

6. Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor,

COSTS—*continued.*

where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other. *Ex parte Hammond, re Jackson, Mont. & Chit. 136.*

7. Petition of three trustees to prove against a bankrupt, fourth contained charges of breach of trust, and prayed consequential directions: Held, the Court could only make the common order to prove. Assignees served entitled to costs of resisting the entire application. Question of costs of employing counsel after an order taken, is determinable by the taxing officer, not by the Court. *Ex parte Smith, re Clark, Mont. & Chit. 347.*

8. On petition to declare bankrupt a trustee, and for conveyance of mortgaged premises, neither the assignees, bankrupt, nor heir of mortgagor need be served. Being served, the petitioner must pay their costs. *Ex parte Smith, re Parker, Mont. & Chit. 598.*

9. If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the Court, *Semble*, the Court will not give costs against them. *Ex parte Young, re Shanks, Mont. & Chit. 599.*

10. Assignee under a fiat superseded for fraud cannot have his costs of appearing from the petitioning creditor. *Ex parte Caldecott, re Heath, Mont. & Chit. 600.*

11. Proceedings under a superseded fiat ordered to be enrolled at the instance of the bankrupt, in order to bring an action. Costs given against the respondents in consequence of previous application and refusal to enrol. *Quære*, as to the lien of a solicitor upon a superseded fiat.

Ex parte and re May, Mont. & Chit. 619.

12. Insolvency in 1828, commission in 1831, and fiat in 1836, against party who had paid no dividends under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor under fiat of 1836, that order discharged, and payment of dividend ordered. Costs out of estate. Assignees under commission of 1831 need not have been served with latter petition, but, having been served by respondents, the assignees under fiat of 1836, their costs also ordered to be paid out of the estate. *Ex parte Catchpole, re Rickaby, Mont. & Chit. 640.*

13. After twenty-three years' contumacy, bankrupt allowed to surrender; such an order is almost of course. Court of Review will not appoint time, &c. for bankrupt to surrender; that is the office of commissioner. Where bankrupt allowed costs of surrender out of his estate. *Ex parte and re Tarleton, Mont. & Chit. 677.*

14. When an assignee was chosen without his authority, and declined to act, the costs of a new choice were ordered to come out of the estate. *Ex parte Pearson, re Stephenson, 3 Dea. 324. S. C. nom. Ex parte Stephenson, re Balcheren, 3 M. & A. 663.*

15. When the leases of several houses were deposited, accompanied with a written memorandum, to secure a debt, and the creditor, eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other

COSTS—continued.

leasehold property as a substituted security, but without any fresh memorandum in writing: Held, nevertheless, that the creditor was entitled to his costs. *Ex parte Cobham, re Halls*, 3 Dea. 609.

16. Quære, Whether the costs of inrolling the proceedings under a fiat are properly costs in the cause? At all events, they are not so, where the inrolment takes place after the defendant has pleaded without giving notice to dispute the bankruptcy, even though he subsequently, under a leave to plead de novo, delivers such notice. *Butcher v. Addison*, 1 Scott, N. C. 175.

COUNSEL OR BARRISTER.

1. If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the Court, Semble, the Court will not give costs against them. *Ex parte Young, re Shanks*, Mont. & Chit. 599.

2. Petition that bankrupt might be at liberty to attend adjudication by counsel refused; but petition retained, with stay of advertisement, if bankruptcy adjudged, and petitioner to apply instant for super-seedeas. *Ex parte and re Foulkes*, Mont. & Chit. 68.

COURT OF REVIEW.

See also JURISDICTION.

1. Where, from a judgment of the Lord Chancellor on a special case, leave had been given to appeal to the House of Lords three months back, and no steps had been taken towards prosecuting the appeal, and

no application made to stay proceedings, quære, whether the Court of Review is justified in refusing to make directions consequential on the Lord Chancellor's judgment. *Ex parte Pollard, re Courtney*, Mont. & Chit. 643.

2. After twenty-three years' contumacy, bankrupt allowed to surrender; such an order is almost of course. Court of Review will not appoint time, &c. for bankrupt to surrender; that is the office of the commissioner. Where bankrupt allowed costs of surrender out of his estate. *Ex parte and re Tarleton*, Mont. & Chit. 677.

3. When the Court makes an order that a creditor shall be permitted to prove for a certain sum, the commissioner cannot decline to receive the proof, until a private meeting has been called to inquire into the nature of the debt. *Ex parte Richardson, re Clagett*, 3 Dea. 377.

CREDITORS.

See also PROTECTION OF CREDITORS.

1. If the certificate do not disclose that it was signed after the last examination, it is defective. Per Sir J. Cross. But the Court can send it back to the commissioners to be set right. A creditor has no right to object to a certificate on the ground of such informality. Per Sir G. Rose. *Ex parte May, in re Malachy*, Mont. & Chit. 18.

2. Upon the bankruptcy of an executor, the Court will secure the fund, but has not jurisdiction to direct payment to the several creditors of the testator. *Ex parte Williams, re Knight*, Mont. & Chit. 91.

DAMNOSA HEREDITAS.

1. A lessee, under an unwritten contract reserving rent on 6th April, and 6th October, became bankrupt, and a fiat issued in March, the rent due in the previous October having been paid. Upon the assignees refusing to accept the premises, the bankrupt offered within fourteen days after his receiving notice of such refusal, and one day before 6th April, to deliver up possession to the lessor: Held, that, under stat. 6 G. 4. c. 16. s. 75., he was not liable in assumpsit for use and occupation to pay any thing in respect of the time subsequent to 6th October. Where the bankrupt holds by an unwritten lease, offering possession is a delivery within sect. 75. *Slack v. Sharpe*, 8 Adol. & Ell. 366.

2. If A. is seeking to recover possession of a leasehold house, in ejectment, and it appear that, after his lease was granted to him, he became bankrupt, he cannot, in anticipation of a supposed defence, that the defendant claims under his assignees, give in evidence declarations of the assignees that they have no interest in the lease. *Colnaghi v. Bluck*, 8 Car. & P. 464.

DEATH.

1. To supersede a joint commission when one of the bankrupts is dead, the administratrix should be a petitioner. *Re Steel*, Mont. & Chit. 73.

2. Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor, where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other.

Ex parte Hammond, re Jackson, Mont. & Chit. 136.

3. A joint fiat issued, and one of the bankrupts died before adjudication. Semble, it becomes absolutely void. Secondly, another petitioner applied for a separate fiat on fresh docket papers, and on the same day the original petitioning creditor applied for a separate fiat on amended papers: Held, that the original petitioning creditor was entitled to the fiat; the joint one being rendered defective by act of God only, and through no fault of the petitioning creditor. Costs of second petitioning creditor refused. *Quære*, as to power of Lord Chancellor to render a joint fiat effective as to one bankrupt only. *Ex parte and re Norris*, Mont. & Chit. 157.

4. A partner dying, leaving a solvent estate, is not a case within the rule, that a joint creditor cannot prove in competition with separate creditors so long as there is a solvent partner liable. *Ex parte Baerman, re Lomas*, Mont. and Chit. 573. S. C. 3 Dea. 476.

DEBT, EXTINGUISHMENT AND SUSPENSION OF.

1. A creditor having his debtor in execution dies. A fiat issues against the debtor, who, some time after, obtains a judge's order for his discharge, which the executor of the creditor, though served with notice, does not oppose: Held, that the debt was not extinguished, but that the executor might prove it against the bankrupt's estate. *Ex parte Goodman, re Nainby*, Mont. & Chit. 151.

2. *Quære*, how far a debt is suspended at law by the subsistence of a trust deed for the benefit of cre-

**DEBT, EXTINGUISHMENT
AND SUSPENSION OF —
*continued.***

ditors, signed by the creditors, and still only in fieri, so as to become incapable of sustaining a fiat. Ex parte and re *Brown*, Mont. & Chit. 213.

DEBTOR AND CREDITOR.

A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C., as a security for a debt, and C. gave notice of the assignment to A., but not to B. The owner having subsequently become bankrupt, it was held, that the arrears of freight were not in his order and disposition at the time of his bankruptcy. Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Myl. & Cr. 129.

**DEBTOR IN EXECUTION,
DISCHARGE OF.**

A creditor having his debtor in execution dies. A fiat issues against the debtor, who some time after obtains a judge's order for his discharge, which the executor of the creditor, though served with notice, does not oppose: Held, that the debt was not extinguished; but that the executor

might prove it against the bankrupt's estate. Ex parte *Goodman*, re *Nainby*, Mont. & Chit. 151.

**DECISIONS COMMENTED ON,
DOUBTED, &c.**

1. Ex parte *Keys*, 3 Dea. & Chit. 263. 1 Mont. & Ayr. 226. commented upon. In re *Hall*, Mont. & Chit. 489.

2. Ex parte *Keys*, 3 Dea. & C. 263. 1 M. & A. 226. commented on. Contrary to Lord Brougham, in Ex parte *Keys*, *suprà*, Lord Cottenham refused to make an order to hear a matter by way of appeal from the Court of Review upon petition, or otherwise than by special case, and to leave the respondents to apply to discharge the order. Ex parte *Stubbs*, re *Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

3. Ex parte *Marston*, Mont. & Chit. 576. commented on. Ex parte *Law*, re *Hague*, Mont. & Chit. 597.

**DECLARATION OF INSOL-
VENCY.**

The bankrupt, at the suggestion of his creditors, signed a declaration of insolvency, upon the alleged understanding "that it should not be made use of or inserted in the Gazette, unless it should afterwards become necessary to do so:" Held, in the absence of evidence of bad faith, that the discretion as to its insertion rested with the creditors. Ex parte and re *Rowe*, Mont. & Chit. 334.

DELIVERY UP OF CHATTELS.

Goods sent to broker for sale, he sells, according to sold note, ostensibly to A. B., but secretly, and ac-

DELIVERY UP OF CHATTELS— *continued.*

cording to bought note, to A. B. and self. A. B. insolvent. Broker bankrupt, and at time of bankruptcy goods remain in his possession: Held, contract void, and that owner might reclaim them specifically. *Ex parte Huth, re Pemberton*, Mont. & Chit. 667.

DEMAND.

When costs are directed to be paid to A. or his solicitor, a personal demand by A. alone is sufficient to ground an application for a committal of the party for non-payment of them. *In re Diack*, 3 Dea. 53.

DEPOSITIONS OF DEBT.

Deposition of debt against a bankrupt indorser of bill, not shewing notice of dishonour of bill to have been given to him: Held, not defective, if commissioner be satisfied aliunde, or if it be the fact that notice was given. *Quære*, Whether any creditor can object to the informality of such deposition on a question of proof? *Ex parte Marston*, and *Ex parte Broome, re Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

DEPOSITIONS GENERALLY.

1. Where a witness had been examined before commissioners of bankruptcy shortly after the act of bankruptcy, *Semble*, that he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date. *Smith v. Morgan*, 2 Moo. & Rob. 257.

2. Depositions made by a witness sent by the petitioning creditor to

prove an act of bankruptcy before the commissioners, are admissible in evidence against the petitioning creditor in any subsequent action against him, although the witness is still living. *Gardner v. Moulst*, 2 Per. & D. 403.

DISCHARGE.

See DEBTOR IN EXECUTION.

DISCHARGING ORDER.

See ORDER.

DIVIDENDS GENERALLY.

See also UNCLAIMED DIVIDENDS.

1. Proof made, and then part payment of debt by surety: Held, creditor entitled to receive dividends on entire proof. *Ex parte Coplestone, re Snell*, Mont. & Chit. 262.

2. Insolvency in 1828, commission in 1831, and fiat in 1836, against party who had paid no dividends under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor under fiat of 1836, that order discharged and payment of dividend ordered: costs out of estates. *Ex parte Catchpole, re Rickaby*, Mont. & Chit. 640.

DIVIDEND, REFUNDING.

1. A. and B., secretly partners, using the one his name as drawer, and the other his as acceptor of bills, inquiry directed as to their general habit, and whether they intended thereby to bind the partnership

DIVIDEND, REFUNDING —
continued.

estate. A creditor holding such bills, proved them first against the separate estate of A., under a separate fiat, then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof is expunged accordingly: Held, that by receiving the dividend he had not made his election to abide by his separate proof, but on refunding the dividend he might elect to come in under the joint fiat. *Ex parte Law, re Bazley*, Mont. & Chit. 111.

2. A. B. gave his accommodation acceptance to the bankrupt, who deposited it with his bankers to secure his floating balance; the bankers proved a debt to a much larger amount, and received a dividend of only 2s. in the pound. A. B. subsequently paid his acceptance: Held, per C. R., A. B. had no right to call on the bankers to refund the amount of the 2s. dividend, but had a right to future dividends; but reversed by the Lord Chancellor on appeal, and bankers ordered to refund. *Ex parte Holmes, re Garner*, Mont. & Chit. 301.

DOCKET PAPERS, AMENDING.

An error in Christian name of petitioning creditor, occurring in one part of docket papers, though right in prior part, query, if material? But leave given to amend, without prejudice. That order not discharged, except on notice of motion. In *re Sale*, Mont. & Chit. 350.

DOUBLE PROOF.
See PROOF, DOUBLE.

EFFECT OF BANKRUPTCY.

1. Semble, that conditions, as to residence, &c., otherwise to forfeit the estate, are at an end upon bankruptcy. *Ex parte Goldney, re Goldney*, Mont. & Chit. 89.

2. A fiat of bankruptcy issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bankrupt and his creditors: Held, that the indentures of apprenticeship were discharged. *Allen v. Coster*, 1 Beavan, 274.

3. The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver. *Bainbrigge v. Blair*, 1 Beavan, 495.

4. A husband, upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of trustees for a term of years, to secure a jointure for the wife; with remainder to the use of such children of the marriage as the husband and wife jointly, or, in default of a joint appointment, the survivor of them should appoint; with remainder, in default of such appointment, to the children of the marriage equally; with remainder to the right heirs of the husband. The husband became bankrupt; and, after his bankruptcy, he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favour of the same children, which she stated

EFFECT OF BANKRUPTCY— *continued.*

in her answer: Held, first, that the joint appointment was inoperative, on the ground that the husband could not, by a subsequent execution of the power, deprive his assignees of an estate which had been once vested in them by his bankruptcy; secondly (by implication), that such joint appointment could not be considered as the separate appointment of the wife, who survived; and, thirdly, that the wife's separate appointment, after the husband's death, was a good exercise of the power, and that the account of the rents prayed by the bill could not be extended beyond the date of that appointment. *Hole v. Escott*, 4 Myl. & Cr. 187.

5. Held, that a bequest, subject to a clause of forfeiture in case the legatee should mortgage, charge, sell, or expose to sale, assign, or incumber, was not forfeited by the bankruptcy of the legatee. *Whitfield v. Prickett*, 2 Keen, 608.

6. An action having been brought to recover damages for a breach of an agreement, by which the defendant covenanted to purchase an estate of the plaintiff, for which he was to pay a large sum by instalments, and secure the remainder by an annuity, chargeable upon certain property of sufficient value, a verdict was taken at nisi prius for 10,000*l.*, subject to a reference of the cause, and all matters in difference; 3500*l.* to be paid by the defendant into the hands of the arbitrator, to be paid as the latter thought fit, and the arbitrator to order what should be done in the action. The arbitrator awarded that the plaintiff was entitled to have a verdict entered for him on the several issues in the cause, and that he

had sustained damage, by reason of the premises in the pleadings mentioned, and the matters in difference, to the amount of 6067*l.*; and he then awarded that the 3500*l.* should be paid to the plaintiff, together with a further sum of 2567*l.*, the balance of such damages on all the causes of action: Held, that the award, although it did not distinguish the amount awarded, in respect of the action, from that upon the matters in difference, and although it awarded a gross sum, including the value of the annuity, was good: Held also, that the bankruptcy of the defendant, before the making of the award, was not a ground for setting aside the award. Semble, that the bankruptcy did not operate as a revocation of the submission to reference. *Taylor v. Shuttleworth*, 8 Dowl. Pr. Ca. 281.

7. Where a defendant has become bankrupt, after action commenced, the Court will not stay proceedings, on the ground that the plaintiff has proved his debt under the fiat, but application should be made to the Court of Review or the Great Seal. *Ransford v. Barry*, 7 Dowl. Pr. Ca. 807.

8. A defendant may apply to set aside a warrant of attorney, and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110. s. 9, although he have become bankrupt since the execution of it. *Taylor v. Nicholls*, 6 Mees. & Wels. 91.

ELECTION.

1. A. and B. secretly partners, using the one his name as drawer, and the other as acceptor of bills, inquiry directed as to their general habit, and whether they intended

ELECTION—continued.

thereby to bind the partnership estate. A creditor holding such bills proved them first against the separate estate of A. under a separate fiat; then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof is expunged accordingly: Held, that, by receiving the dividend, he had not made his election to abide by his separate proof; but, on refunding the dividend, he might elect to come in under the joint fiat. *Ex parte Law, re Bazley*, Mont. & Chit. 111.

2. H., a shareholder, becomes largely indebted to the N. and C. Bank for calls, and (to a small extent) on his banking account. H., by deed reciting he was so indebted, gives security to cover the debt by equitable mortgage and other property. The company bring an action against him by their registered officer, under the 7 Geo. 4. c. 46. for the amount claimed, but abandon that action, and then file a bill, praying an account and sale of securities. The 1 & 2 Vict. c. 110., then passing, they swear an affidavit of debt to the full amount claimed, and cause H. to commit an act of bankruptcy under section 8. The other shareholders had not paid up their calls, and the company was so far solvent that H.'s shares would, if sold, considerably reduce the balance against him. A fiat issues, and is proceeded with to the second meeting; but no creditors other than the company appearing (H. swearing that except to the company he did not owe 5*l.* in the world), no choice of assignees could take place. On petition by H., looking at the fiat as process

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(although good at law), and upon equitable principles, fiat was superseded. *Erskine C. J. dubit. Quære*, Whether the Court ought not to put the creditor to his election between the fiat and the suit in equity. *Ex parte* and *re Hall*, Mont. & Chit. 365.

3. Party obtaining leave to appeal, ordered to elect within a given time whether he would proceed with it or not. *Ex parte Pollard, re Courtney*, Mont. & Chit. 643.

ENFORCING ORDER.

See ORDER.

ENROLMENT OF PROCEEDINGS.

1. Proceedings under a superseded fiat ordered to be enrolled at the instance of the bankrupt, in order to bring an action. Costs against the respondents, in consequence of previous application and refusal to enrol. *Quære*, as to the lien of a solicitor upon a superseded fiat. *Ex parte* and *re May*, Mont. & Chit. 619. *See the note there.*

2. *Quære*, Whether the costs of inrolling the proceedings under a fiat are properly costs in the cause? At all events they are not so, where the enrolment takes place after the defendant has pleaded without giving notice to dispute the bankruptcy, even though he subsequently, under a leave to plead *de novo*, delivers such notice. *Butcher v. Addison*, 1 Scott. N. C. 175.

EQUITABLE MORTGAGE.

1. If a petition for the sale of an equitable mortgage is rendered necessary from a mistaken view by the assignees of their rights, they can

3 A

EQUITABLE MORTGAGE— *continued.*

claim costs only out of the bankrupt's general estate. *Ex parte Bale*, re *Gough*, Mont. & Chit. 58.

2. On application by equitable mortgagee for leave to bid, Court will not make order to spare her from paying deposit if declared the purchaser. *Ex parte Wilson*, re *Maltby*, Mont. & Chit. 110.

3. According to English law, an equitable mortgage was effected of Scotch property. The special case found, that "by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit." Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors, being resident here, the property came to the hands of the assignees charged with the equity, and therefore they were bound to pay the mortgage debt out of the proceeds of the particular property. *Ex parte Pollard*, re *Courtney*, Mont. & Chit. 239.

4. When the leases of several houses were deposited, accompanied with a written memorandum, to secure a debt, and the creditor eight months afterwards, at the bankrupt's request, returned him four of the leases, and took the deeds of other leasehold property as a substituted security, but without any fresh memorandum in writing: Held, nevertheless, that the creditor was entitled to his costs. *Ex parte Cobham*, re *Hall*, 3 Dea. 609.

EVIDENCE OF INSOLVENCY.

Declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are

admissible in evidence to prove such knowledge; provided the fact of his insolvency be proved aliunde.—*Semble*, that the fact of insolvency should be proved before the declarations are offered in evidence. *Thomas v. Connell*, 4 Mees. & Wils. 267.

EVIDENCE GENERALLY.

1. *Quære*, the policy of a Judge suggesting an equity to the parties, who have not themselves suggested it on the record, or called the attention of their opponents to it, so as to enable them to point their evidence to that mode of looking at it. *Ex parte and re Brown*, Mont. & Chit. 217.

2. The danger of receiving the evidence of parties themselves, *ex post facto*, as to their original intentions. *Ex parte Jackson*, re *Warwick*, Mont. & Chit. 271.

3. A., B., and C., partners in trade together, with D. as their surety, enter into a joint and several bond to their bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but at the time of the bankruptcy of A., B., and C. a much larger balance was due from them to the bankers than the sum secured by the bond. D., the surety, died; and in a creditor's suit brought by the bankers against his representatives, to which suit the assignees of A., B., and C. were also parties, it was found that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that

EVIDENCE GENERALLY—
continued.

should become due to them; but that the surety intended the bond to be a security only for the particular balance due to them, at the date of the bond: Held, that the bond was, under these circumstances, proveable by the bankers against the separate estate of A. for the whole amount of the principal and interest secured by it. *Semble*, that the proceedings in the Chancery suit were admissible in evidence on this petition; the assignees being parties in both proceedings, and the subject-matter being the same, although the question in the suit was the liability of the surety, and the question in this petition, the liability of the principal debtors, on the bond. *Ex parte Walker, re Fidgeon*, 3 Dea. 672.

4. Where a witness had been examined before commissioners of bankrupt shortly after the act of bankruptcy. *Semble*, that he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date. *Smith v. Morgan*, 2 Moo. & Rob. 257.

5. If A. is seeking to recover possession of a leasehold house in ejectment, and it appears that, after his lease was granted to him, he became bankrupt, he cannot, in anticipation of a supposed defence that the defendant claims under his assignees, give in evidence declarations of the assignees that they have no interest in the lease. *Colnaghi v. Bluck*, 8 Car. & P. 464.

EXAMINATION GENERALLY.

See BANKRUPT.

EXAMINATION VIVA VOCE.

Practice of the Court as to directing a *vivâ voce* examination. *Ex parte Tate, re Odlin*, 3 Dea. 516.

EXECUTION.

1. Held, that the estate of a partner in a joint stock company, who has become bankrupt, and against whom judgment has not been obtained pursuant to 7 G. 4. c. 46. ss. 9. 12, and 13., is liable to the claims of a creditor of the company; bankruptcy being a statutory execution. *Ex parte Marston*, and *Ex parte Broome, re Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

2. On the 6th July, an execution was levied on the goods of A., on the 19th of the same month the 2 & 3 Vict. c. 29. came into operation, and a few days afterwards, a fiat of bankruptcy issued against A. upon an act of bankruptcy committed before the levy: Held, that the act rendered the execution valid, and that the assignees were not entitled to the property. *Edwards v. Lawley*, 8 Dowl. Pr. Ca. 234. S. C. 6 Mees. & Welsb. 285.

EXECUTORS AND ADMINISTRATORS.

See also BANKRUPT EXECUTOR.

1. Unclaimed dividends in hands of executor of surviving assignee ordered into Court, but new assignees must be appointed, before the executor will be released. *Ex parte Raikes, re Tuke*, Mont. & Chit. 96.

2. Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor where they have brought an action

EXECUTORS AND ADMINISTRATORS—*continued.*

for the amount, to the costs of which the assignees are liable, can they set off such costs against each other. *Ex parte Hammond, re Jackson*, Mont. & Chit. 136.

3. Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer, and then dissolve the partnership, upon which occasion the two continuing partners, give the executors a bond to secure the balance due to them; and more than six years afterwards the two become bankrupt: Held, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. *Ex parte Hall*, 3 Dea. 125.

EXPUNGING.

See PROOF EXPUNGING.

EXTINGUISHMENT.

See DEBT, EXTINGUISHMENT OF.

FEME COVERT.

Bankrupt's wife admitted to prove. *Ex parte Thring*, Mont. & Chit. 75.

FIAT.

Amending.

1. The petitioning creditor's debt, was by mistake sworn to be a joint debt: fiat had been taken out in the name of two, and had been opened: Court refused liberty to amend the fiat, but gave liberty to take out a new fiat. *Ex parte Rhands, re Morris*, Mont. & Chit. 348.

Renewed.

2. The pendency of a petition before the Lord Chancellor to annul a renewed fiat, is no objection to the hearing of a petition to sustain it, and supersede a renewed commission of prior date; nor is it a sufficient objection, that the petitioning creditor under the latter is not served. The superseding such a commission is merely a question of convenience to the estate, and if the commissioners named in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed fiat. *Ex parte Higgs, re Evans*, Mont. & Chit. 94.

Incorporating.

3. A., B., and C., partners; A., bankrupt; B., bankrupt; A., B., and C., bankrupts. Under the separate fiats part of the joint estate had been administered, and a dividend declared. No separate estates or debts. Order to incorporate the separate under the joint fiat, and to stay proceedings thereunder, and liberty to review the choice of assignees. Bankrupts need not be served with petition for this purpose. *Ex parte Lister, re Haddon*, Mont. & Chit. 260.

Issuing.

4. For the purpose of determining whether a fiat issued within the two months mentioned in the 6 G. 4. c. 16. s. 6., the date of it is *prima facie* evidence of the day of its "issuing," although it was shown not to have been delivered out by the Lord Chancellor's officer till the day after its date. *Semble*, "issuing," and "suing forth," in the 6 G. 4. c. 16. s. 6., mean "applying

FIAT—continued.

for " a fiat, per C. R. and L. C. Ex parte and re *Rowe*, Mont. & Chit. 334.

Contemporaneous or Second Fiat.

5. The pending of a petition before the Lord Chancellor to annul a renewed fiat, is no objection to the bearing of a petition to sustain it, and supersede a renewed commission of prior date; nor is it a sufficient objection that the petitioning creditor under the latter is not served. The superseding such a commission is merely a question of convenience to the estate, and if the commissioners named in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed fiat. Ex parte *Higgs*, re *Evans*, Mont. & Chit. 94.

6. Second fiat issued by the same petitioning creditor. Ex parte *Partridge*, re *Knibb*, Mont. & Chit. 165.

7. Leave, under circumstances, to same petitioning creditor to issue a second fiat, time for prosecuting the first having expired. In re *Knibb*, Mont. & Chit. 290.

8. Insolvency in 1828, commission in 1831, and fiat in 1836, against party who had paid no dividends under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor under fiat of 1836, that order discharged, and payment of dividend ordered. Costs out of estate. Ex parte *Catchpole*, re *Rickaby*, Mont. & Chit. 640.

9. The petitioning creditor issued a fiat on the 20th December, 1837, but forbore to prosecute it, to enable the bankrupt, who had some disputes pending with his partner, to settle them by arbitration. The award was not made till the 14th February, 1839, when the petitioning creditor applied for leave to issue another fiat; but the application was refused both by the Court of Review and the Lord Chancellor. Ex parte *Foljambe*, re *Hewitt*, 3 Dea. 628.

10. Under a plea that the plaintiff was not possessed as of his own property as assignee of the chattels in question, it appeared that the plaintiff claimed as assignee under a second commission, under which the bankrupt had obtained his certificate, but his estate had not produced sufficient to pay 15s. in the pound: Held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to shew in answer to the plaintiff's claim that the goods (after acquired property) had been suffered to remain in the order and disposition of the bankrupt by the consent and permission of the true owner, and therefore passed under the 7 G. 4. c. 57. s. 30. to the assignees of the Insolvent Debtors' Court, the bankrupt having taken the benefit of that act. *Butler v. Hobson*, 5 Scott, 798. S. C. 5 Bing. N. C. 128.

11. A fiat issued against a trader who had already been twice bankrupt, and obtained his certificate on both occasions, but whose estate had not produced sufficient to pay the creditors under the second commission 15s. in the pound. The bankrupt had between the time of obtaining his certificate under the second commission and the issuing of the fiat, carried on business to a con-

FIAT—continued.

siderable extent, and was possessed of property which might at any time have been made available in satisfaction of the debts proved under the second commission; and the assignees under that commission was aware of these facts: Held, that, under these circumstances, the fiat was not void: such after acquired property having been suffered to remain in the possession of the bankrupt as reputed owner, and therefore being such as by virtue of the 6 G. 4. c. 16. s. 72. the fiat might operate upon. *Butler v. Hobson*, 5 Scott, 824. S. C. 5 Bing. N. C. 128.

12. A certificate under a second commission will not exempt the bankrupt's "future estate and effects" from the claim of his assignees to seize it under the 6 G. 4. c. 16. s. 127., unless the "estate" of the bankrupt existing at the date of the certificate shall have actually produced sufficient to pay 15s. in the pound. *Id. ib.*

Joint and separate.

13. An application for appropriation of funds under a separate fiat need not stand over because a subsequent joint fiat has issued, under which a petition to supersede the separate fiat is pending. In *re Haddon*, Mont. & Chit. 42.

Country.

See also FIAT, Change of Venue.

14. The pendency of a petition before the Lord Chancellor to annul a renewed fiat, is no objection to the hearing of a petition to sustain it, and supersede a renewed commission of prior date; nor is it a sufficient objection that the petitioning cre-

ditor under the latter is not served. The superseding such a commission is merely a question of convenience to the estate, and if the commissioners named in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed fiat. *Ex parte Higgs*, re *Evans*, Mont. & Chit. 94.

Change of Venue.

15. London fiat, instead of at Gosport, issuable when large majority of the creditors reside in London. Costs payable in the first instance by the petitioning creditor, to be recouped out of the estate. *Ex parte Ellis*, re *Grigg*, Mont. & Chit. 39.

16. A London fiat will not be issued against a country trader because the petitioning creditor resides in London, where 1300*l.* out of 2000*l.* creditors also reside, and the proof of the act of bankruptcy is more easy and less expensive in London. *Ex parte Rawlings*, re *Jones*, Mont. & Chit. 59.

17. In general a fiat ought to be issued to the place where the bankrupt resides. *Ex parte Brett*, re *Moses*, Mont. & Chit. 70.

18. A London fiat will not be issued against a country trader on the allegation that the act of bankruptcy is a fraudulent conveyance, and that a greater facility to commit fraud against the London creditors, exists in the country than in London fiat. *Ex parte Meeking*, re *Bray*, Mont. & Chit. 71.

19. When the fiat can be more conveniently worked at a particular place in the country, it will be issued to that place. *Re Haines*, Mont. & Chit. 72.

20. Town fiat not issuable, although the majority of creditors and

FIAT—continued.

witnesses to prove requisites reside in London. *Re Hugo*, Mont. & Chit. 74.

21. Application for a London fiat against a bankrupt at Spalding. Eighteen creditors resided in London, three at Spalding, and others at different parts of the country. No order. *Re Hellyer*, Mont. & Chit. 74.

22. An application to remove a fiat, and, if not, that the petitioning creditor's affidavit may be received, cannot be united in the same application. *Re Wright*, Mont. & Chit. 144.

23. A London fiat may be issued against a Cheltenham trader, 120 miles from London, when the petitioning creditor, the witnesses to prove the act of bankruptcy, and major part in value of the creditors, reside in London. *Anon.*, Mont. & Chit. 142.

24. The residence in London of all the creditors but one, not a sufficient reason for issuing a London fiat against a country trader. *Anon.*, Mont. & Chit. 142.

25. The non-existence of creditors at the place to which a country fiat is issued, is not a sufficient reason for its removal. *In re Binks*, Mont. & Chit. 143.

26. A country fiat will not be removed because the petitioning creditor and witness to prove the act of bankruptcy reside in London, and they are small creditors in the country, and the object is to invalidate a preference. *Re Mansfield*, Mont. & Chit. 145.

27. If two of the commissioners are creditors, and two reside at a distance, and the fifth generally declines to attend, and only four out of 60,000*l.* pound creditors reside in

the neighbourhood of the place, the fiat will be removed to London. *Re Geach*, Mont. & Chit. 145.

28. The residence of the major part of the creditors, and the petitioning creditor in London, not a sufficient reason for removing a country fiat. *Anon.* Mont. & Chit. 146.

29. Where a country fiat will not be changed. *Re Allen*, Mont. & Chit. 146.

30. Venue of fiat changed to London, object being to set aside fraudulent preference to a London creditor, and all evidence to prove it, and requisites of fiat, residing in London. *Re James*, Mont. & Chit. 349.

31. Venue of fiat not changed from N. to M., though more than two thirds in number and value of creditors reside at M., and the petitioning creditor and evidence to prove the act of bankruptcy also resided there, and the act of bankruptcy was there committed. *Re Storey*, Mont. & Chit. 362.

32. Bankrupt a hawker, travelling about the country, neither residing, nor trading in any one place particularly, but described in docket papers as of Sherborne, 117 miles from London. All creditors, but one in Ireland, resided in London, and witnesses to support fiat, in London: bankrupt had absconded with effects. Fiat removed from Sherborne to London. *Ex parte Martin*, *re Graham*, Mont. & Chit. 639.

33. Application to change venue of fiat from Cheltenham to London; two creditor's debts, equal to 1000*l.* at Cheltenham; twenty-two debts, equal to 2700*l.* in London; one debt, equal to 2628*l.* at Bedford; thirteen debts, equal to 700*l.* in the north. Witnesses, &c. in London. Petition refused by Court of Review, but

FIAT—*continued.*

granted by Lord Chancellor. Ex parte *Lycett*, re *Wild*, Mont. & Chit. 642.

34. Fiat having issued, if commissioners cannot, or decline to act, alternative offered to petitioning creditor, making removal to fresh list, and an extension of time, either leave to take out a new fiat to fresh list, or to amend fiat accordingly, without extension of time. Applications to extend time to open fiat, to give effect to negotiations for compromise, discountenanced. Ex parte *Castle*, re *Todd*, Mont. & Chit. 654.

35. Bankrupt trading in London and country, a town fiat issues of course, unless special order obtained for country fiat. Ex parte *Gawry*, re *Walker*, Mont. & Chit. 679.

36. The Court refused to allow a fiat to be directed to the place, where the bankrupt had formerly resided and traded for three years up to 15th June, 1837, and where he had become largely indebted to persons also residing there, notwithstanding he had since that period had no permanent place of abode, but had resided only for a few months together in five different and distinct parts of the kingdom. Re *Hewitt*, 3 Dea. 586.

37. The Court will not order the fiat to be directed to a London commissioner, instead of country commissioners, merely because a majority of the creditors reside in London. Ex parte *Rawlinson*, re *Jones*, 3 Dea. 535.

Superseding.

38. Where a bankrupt, petitioning to supersede for want of requisites to support fiat, has applied for copies, and seen the proceedings, the

onus probandi of his case lies on him, and it is not sufficient to deny the requisites generally; and without his doing so the respondent may rely on the proceedings alone. Ex parte and re *Ford*, Mont. & Chit. 97.

39. A fiat founded on a bill due to a solicitor, before taxation, is good. *Primâ facie*, if afterwards, on taxation, it is reduced below 100*l*. Semble, the fiat will be superseded. S. C. id. ib.

40. B. and P. (the petitioners) carried on business as cotton spinners, under the firm of B. and P., at the Grove Mills, and, becoming embarrassed, applied to the M. and T. district banking company for an advance; and it was arranged by a deed dated 22d August, 1837, that the banking company should take the management of the concern into their hands, by means of J., their manager, under the firm of the "Grove Mills Company;" that B. and P. should conduct the business as employees of the banking company, at a salary; that the banking company should pay all debts, and repay themselves out of the profits, and that, if they chose finally to wind up and close the concern, they should give B. and P. a full release and discharge from all debts then or to become due. Under this arrangement the affairs are carried on until the 3d October, 1838, when notice is given to B. and P. that the company intend to close the concern; and, at the same time, J., the manager, intimates to B. and P. that they will probably receive a notice from the company, pursuant to the 1 & 2 Vict. c. 110. s. 8., but that it would be a mere matter of form, and that they need be under no apprehension concerning it.

On the 22d October following, J., as manager, swore an affidavit of

FIAT—*continued.*

debt, pursuant to the above act, and on the 25th served the requisite notice on B. and P. The affairs having been wound up, B. and P. claimed a release, pursuant to the deed of August, 1837, and on the 6th November filed a bill in chancery, praying to be declared so entitled. A negotiation for a compromise of the suit was then entered into, and a memorandum of agreement, dated 13th November, was executed, by which B. and P. were to give up to the company all they had in the world, on condition that the company should release them from all their claims, and discharge their debts; and it was provided that a clause should be inserted in the deed, making void the release if B. and P. concealed or withheld any of their property. The proceedings in chancery are altogether discontinued, and the respective solicitors of the parties proceeded to prepare the last-mentioned deed and the release to B. and P., and the banking company continued to deal with the property till the 30th November, 1838. On the 15th November, the twenty-one days after the notice provided by the statute, expired. On the 30th November the solicitors for the banking company wrote to the solicitors of B. and P., saying, "that disclosures of improper acts by B. and P. had been made within the last three days, and that further proceedings with the proposed deeds should be stayed for the present," but still appearing to invite explanation. On the same day docket papers were prepared, and on the 1st December a docket was struck; on the 3d the fiat was issued, which was opened on the 6th: Held, that no act of bankruptcy was com-

mitted, because, under the above circumstances, the banking company were to be considered as consenting to the default of payment beyond the twenty-one days, and that they had accepted security, *pro. tem.*, at and prior to the twenty-second day, so as to satisfy the notice given under the statute. The fiat was superseded with costs. *Ex parte and re Brown, Mont. & Chit. 177.*

41. *Quære*, whether, on a legal objection, the alleged bankrupt can come before adjudication to supersede the fiat? *Ex parte and re Brown, Mont. & Chit. 231.*

42. The affidavit (dated 22d April, 1839.), under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.* and upwards," on bills of exchange as due to A., the "deponent, and B. and C., his late partners." The notice and requisition to pay (dated the 24th April), was in respect of a debt of 3612*l.*, but intended as the same and the real debt, and was signed by A. for B. and C. and himself. On the 24th April, A. filed another affidavit, swearing the debt to be 3612*l.* "upon bills of exchange," and on the 2d May, A. and B., for themselves, and C., gave a corresponding notice. The commissioner approved a bond for 200*l.*, as security under the first affidavit, although he had notice that the real debt was the 3612*l.* On the 3d June A., B., and C. issued a fiat on the alleged act of bankruptcy by not having given security under the second affidavit and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the 8th section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat, and the petitioning creditor's

FIAT—*continued.*

affidavit, on striking the docket, stated the debt to be due "for goods sold and delivered:" Held, these were not sufficient objections to warrant the staying the advertisement in the Gazette; and upon the question of supersedeas, *quære*, whether these, or any of them, are sufficient grounds for superseding. Per Sir G. Rose. The proof of the act of bankruptcy by the solicitor to the fiat, is sufficiently bad to induce the Court to send the question to be tried by action at law. *Ex parte and re Rhodes*, Mont. & Chit. 319.

43. A petition to supersede a joint fiat (one party only having been declared bankrupt), and the affidavits in support being entitled in the matter of the one so declared only: Held, defective, but leave given to amend. *Ex parte and re Fisher*, Mont & Chit. 345.

44. Per Sir G. Rose. If it be doubtful whether an action at law is maintainable to recover the petitioning creditor's debt, it is the duty of the Court to uphold the fiat, to give an opportunity to try that right in an action by the bankrupt against the assignees. *Ex parte and re Hall*, Mont. and Chit. 365.

45. H., a shareholder, becomes largely indebted to the N. and C. bank for calls, and (to a small extent) on his banking account. H., by deed reciting he was so indebted, gives security to cover the debt, by equitable mortgage and other property. The company bring an action against him by their registered officer, under the 7 G. 4. c. 46., for the amount claimed, but abandon that action, and then file a bill, praying an account and sale of securities. The 1 & 2 Vict. c. 110. then passing, they swear an affidavit of debt to

the full amount claimed, and cause H. to commit an act of bankruptcy under section 8. The other shareholders had not paid up their calls, and the company was so far solvent that H.'s shares would, if sold, considerably reduce the balance against him. A fiat issues, and is proceeded with to the second meeting; but no creditors other than the company appearing (H. swearing that, except to the company, he did not owe 1*l.* in the world), no choice of assignees could take place. On petition by H., looking at the fiat as process, (although good at law), and upon equitable principles, fiat was superseded. Erskine C. J. dubit. *Quære*, whether the Court ought not to put the creditor to his election between the fiat and the suit in equity. S. C. id. ib.

46. It having been the constant practice of the Court of Review to direct that fiats be annulled "if the Lord Chancellor shall think fit," and not merely to confine their order to the reversal of the adjudication under the 17th section, that practice is confirmed and approved by the Lord Chancellor. *Ex parte Stubbs*, re *Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

47. Arguendo, Court of Review has no power to annul a fiat, only to reverse adjudication. S. C. id. ib.

48. The 1 & 2 W. 4. c. 56. s. 17. incidentally assumes that the Court of Review has power to try all questions of supersedeas. Per Lord Chancellor. S. C. id. ib.

49. Assignee under a fiat superseded for fraud, cannot have his costs of appearing from the petitioning creditor. *Ex parte Caldecott*, re *Heath*, Mont. & Chit. 600.

50. A fiat cannot be superseded on the mere ground of concert; but, *secus*, a fraudulent fiat, at the in-

FIAT—*continued.*

debt, pursuant to the above act, and on the 25th served the requisite notice on B. and P. The affairs having been wound up, B. and P. claimed a release, pursuant to the deed of August, 1837, and on the 6th November filed a bill in chancery, praying to be declared so entitled. A negotiation for a compromise of the suit was then entered into, and a memorandum of agreement, dated 19th November, was executed, by which B. and P. were to give up to the company all they had in the world, on condition that the company should release them from all their claims, and discharge their debts; and it was provided that a clause should be inserted in the deed, making void the release if B. and P. concealed or withheld any of their property. The proceedings in chancery are altogether discontinued, and the respective solicitors of the parties proceeded to prepare the last-mentioned deed and the release to B. and P., and the banking company continued to deal with the property till the 30th November, 1838. On the 15th November, the twenty-one days after the notice provided by the statute, expired. On the 30th November the solicitors for the banking company wrote to the solicitors of B. and P., saying, "that disclosures of improper acts by B. and P. had been made within the last three days, and that further proceedings with the proposed deeds should be stayed for the present," but still appearing to invite explanation. On the same day docket papers were prepared, and on the 1st December a docket was struck; on the 3d the fiat was issued, which was opened on the 6th: Held, that no act of bankruptcy was com-

mitted, because, under the above circumstances, the banking company were to be considered as consenting to the default of payment beyond the twenty-one days, and that they had accepted security, *pro tem.*, at and prior to the twenty-second day, so as to satisfy the notice given under the statute. The fiat was superseded with costs. *Ex parte and re Brown, Mont. & Chit. 177.*

41. *Quære*, whether, on a legal objection, the alleged bankrupt can come before adjudication to supersede the fiat? *Ex parte and re Brown, Mont. & Chit. 231.*

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FIAT—continued.

places, but of London as "A. and Son:" Held, latter docket should be preferred; but without prejudice to any other creditor. Leave to amend docket papers. If first petitioning creditor was ignorant of both places of trading, costs given him out of estate. *Ex parte Gaury, re Waller, Mont. & Chit. 679.*

59. A joint fiat issued, and one of the bankrupts died before adjudication. 1st, Semble, it becomes absolutely void. 2dly, Another petitioner applied for a separate fiat on fresh docket papers; and on the same day the original petitioning creditor applied for a separate fiat on amended papers: Held, that the original petitioning creditor was entitled to the fiat; the joint one being rendered defective by act of God only, and through no fault of the petitioning creditor. Costs of second petitioning creditor refused. *Quære*, as to power of Lord Chancellor to render a joint fiat effective as to one bankrupt only. *Ex parte and re Norris, Mont. & Chit. 157.*

Opening.

60. An application for enlarging the time for opening a town fiat, as the witness to prove the act of bankruptcy did not attend, refused. *Re Hilsdon, Mont. & Chit. 74.*

61. Order made, nunc pro tunc, to dispense with attendance of petitioning creditor at opening of fiat. *Ex parte Whitby, re Atkinson, Mont. & Chit. 642.*

62. Fiat having issued, if commissioners cannot, or decline to act, alternative offered to petitioning creditor, making removal to fresh list, and an extension of time, either leave to take out a new fiat to fresh list, or to amend fiat accordingly,

without extension of time. Applications to extend time to open fiat to give effect to negotiations for compromise discountenanced. *Ex parte Castle, re Todd, Mont. & Chit. 654.*

Validity of.

63. A fiat taken out in order to defeat a judgment creditor, where there are no assets to be administered under it annulled. Mere concert not sufficient. *Ex parte Gaitskill, re King, Mont. & Chit. 160.*

64. A joint fiat issued, and one of the bankrupts died before adjudication. Semble, it becomes absolutely void. *Ex parte and re Norris, Mont. & Chit. 157.*

65. A. and B. carried on trade under the firm of "A. and B." Being indebted to C., it was agreed C. should have the entire management of the business (A. and B. being retained only as C.'s servants), and that the business should be carried on under the firm of "The Grove Mills Company." *Quære*, Whether a fiat issuing against A. and B. as carrying on business under the firm of "The Grove Mills Company," no debt being due from them, as of that firm, is valid. *Ex parte and re Brown, Mont. & Chit. 200.*

66. The solvency of a party made bankrupt is no objection to the fiat. *Ex parte and re Hall, Mont. & Chit. 459.*

67. *Quære*, Whether the Court of Review, having superseded a fiat, and the petitioning creditor having been offered a special case, alleged by him to be erroneous in omitting material facts, and in inserting as findings of the Court matters which were not found, and the petitioning creditor rejecting the special case, the Lord Chancellor has any original jurisdiction to try the validity of the fiat? Leave given to discuss the

FIAT—*continued.*

point before the Lord Chancellor on motion or petition, without prejudice to question, whether, at all events, a petition is not necessary. The 1 & 2 W. 4. c. 56. s. 19. was not intended to revest in the Lord Chancellor the duty of trying questions of supersedeas, on his original jurisdiction: but to protect the Great Seal from being called upon to obey the order of another Court. *Re Hall*, Mont. & Chit. 489.

68. A fiat cannot be superseded on the mere ground of concert; but, secus, a fraudulent fiat, at the instance of the bankrupt, where there are no assets to divide. *Ex parte Caldecott*, *re Heath*, Mont. & Chit. 600.

See also PETITION TO SUPERSEDE.

FOREIGN LAWS.

According to English law, an equitable mortgage was effected of Scotch property. The special case found, that "by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit:" Held, nevertheless, that the parties contracting as well as the assignees under a subsequent fiat against the mortgagors, being resident here, the property came to the hands of the assignees charged with the equity, and therefore they were bound to pay the mortgage debt out of the proceeds of the particular property. *Ex parte Pollard*, *re Courtney*, Mont. & Chit. 239.

FORFEITURE, CLAUSE OF.

1. Effect of bankruptcy on clause of forfeiture of an estate. If, at the time of the bankruptcy, the bankrupt

has a life interest in certain premises, expectant upon the death of the tenant for life, and there is a proviso that the person who is entitled to the use and occupancy of the premises shall reside and dwell therein, and assume the name of the donor, and upon his neglect or refusal to comply with these conditions, shall be considered as dead, and the grant as to him be void, and be for the person next entitled thereto; and if after the bankrupt obtain his certificate the tenant for life die, the estate passes to the assignees. *Ex parte* and *re Goldney*, Mont. & Chit. 75.

2. *Semble*, that conditions as to residence, &c., otherwise to forfeit the estate are at an end upon bankruptcy. S. C. Id. 89.

3. Held, that a bequest, subject to a clause of forfeiture in case the legatee should mortgage, charge, sell, or expose to sale, assign or incur, was not forfeited by the bankruptcy of the legatee. *Whitfield v. Prickett*, 2 Keen, 608.

FRAUDULENT CONCEALMENT.

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court, on a bill filed by the assignees against the Bank of England, ordered the Bank to erase from their books the fictitious name, and insert that of the bankrupt. *Green v. The Bank of England*, 3 You. & Coll. 722.

FRAUDULENT FIAT.

See FIAT, *Validity of.*

FRAUDULENT PREFERENCE.

Return of goods by hirer to lender under threat of fiat in bankruptcy, *Semble*, not an act of bankruptcy as a fraudulent preference. *Ex parte Whibby, re Whibby*, Mont. & Chit. 671.

FRAUDULENT SALE.

Goods were sold by defendant as agent of C., in contemplation of C.'s bankruptcy, for the purpose of raising money for defendant and C. The buyer did not know the sale to be fraudulent: Held, that such sale was not an act of bankruptcy by C. *Harwood v. Bartlett*, 6 Bing. N. C. 61. S. C. 8 Scott, 171.

FUTURE EFFECTS.

1. Under a plea that the plaintiff was not possessed as of his own property as assignee of the chattels in question, it appeared that the plaintiff claimed as assignee under a second commission, under which the bankrupt had obtained his certificate, but his estate had not produced sufficient to pay 15s. in the pound: Held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to shew in answer to the plaintiff's claim, that the goods (after acquired property) had been suffered to remain in the order and disposition of the bankrupt, by the consent and permission of the true owner, and therefore passed under the 7 G. 4. c. 57. s. 30. to the assignees of the Insolvent Debtors' Court, the bankrupt having taken the benefit of that act. *Buller v. Hobson*, 5 Scott, 798. S. C. 5 Bing. N. C. 128.

2. A certificate under a second commission will not exempt the

bankrupt's "future estate and effects" from the claim of his assignees, to seize it under the 6 G. 4. c. 16. s. 127., unless the "estate" of the bankrupt existing at the date of the certificate shall have actually produced sufficient to pay 15s. in the pound. S. C. id. ib. 824. S. C. 5 Bing. N. C. 128.

3. Declaration alleged that, before the making of the promise, &c. defendant was indebted to J. in 200*l.* for money had and received; that a commission of bankrupt had issued against defendant; that, in consideration of the premises, and that J. would prove for the 200*l.* under the commission, defendant promised J. to pay him that sum in a few months; that J. proved, but that defendant did not pay. A verdict was given on this count for J.'s representative. Judgment arrested, on the ground that the count was founded on a promise without legal consideration; the Court refusing to presume that J. in proving for money had and received had waived a tort. *Blealey v. Andrew*, 7 Adol. & Ell. 108.

FRIENDLY SOCIETIES.

If money is entrusted to the treasurer of a friendly society, for which he is to pay interest, and another sum for which he is not to pay interest, and he enters into the statutable bond, as treasurer, for the whole sum, the society, upon the bankruptcy of the treasurer, is entitled to full payment within the 4 & 5 W. 4. c. 40. s. 12., and no part is to be treated as a loan to him in his private character. *Ex parte Ray, re Woodliffe*, Mont. & Chit. 50.

FUND IN COURT.

Money in Court belonging to a married woman, ordered to be applied for the benefit of herself and children, the husband having taken the benefit of the Insolvent Act. *Brett v. Greenwell*, 3 You. & Coll. 230.

HUSBAND AND WIFE.

1. Money in Court belonging to a married woman, ordered to be applied for the benefit of herself and children, the husband having taken the benefit of the Insolvent Act. *Brett v. Greenwell*, 3 You. & Coll. 230.

2. The wife of an uncertificated bankrupt is not a competent witness, in an action by the assignees, to prove a payment by the bankrupt to the defendant after bankruptcy. *Williams v. Williams*, 8 Dowl. Pr. Ca. 220.

See also FEME COVERT.

INJUNCTION.

1. A casual conversation is sufficient notice to prevent reputed ownership. The Court will restrain assignees from proceeding at law to invalidate transfer of shares by virtue of reputed ownership. Ex parte and re *Richardson*, Mont. & Chit. 43.

2. Quere, as to a mandatory order on bankrupt to perform conditions in a deed of settlement so as to preserve the interest of the assignees. Ex parte and re *Goldney*, Mont. & Chit. 90.

3. The bankrupt, and his surety, entered into an agreement with the assignees to pay all the creditors 20s. in the pound, in consideration of which they agreed, that the fiat should be annulled. In pursuance of this agreement, 10s. in the pound

was paid, and the assignees had a fund sufficient to pay the remainder; but were, nevertheless, proceeding to sell certain property of the bankrupt. On a petition by the bankrupt to restrain them from so doing, the Court declined to make any order, as the requisitions of the composition contract clause had not been complied with. Ex parte and re *Nainby*, 3 Dea. 587.

INQUIRY.

A. and B. secretly partners using the one his name as drawer, and the other his acceptor of bills, inquiry directed as to their general habit, and whether they intended thereby to bind the partnership estate. Ex parte *Law*, re *Bazley*, Mont. & Chit. 111.

INSOLVENCY.

1. Declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are admissible in evidence to prove such knowledge; provided the fact of his insolvency be proved aliunde. Semble, that the fact of insolvency should be proved before the declarations are offered in evidence. *Thomas v. Connell*, 4 Mees. & Wels. 267.

2. Under a plea that the plaintiff was not possessed as of his own property as assignee of the chattels in question, it appeared that the plaintiff claimed as assignee under a second commission, under which the bankrupt had obtained his certificate, but his estate had not produced sufficient to pay 15s. in the pound: Held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to shew, in answer to the plaintiff's claim, that the goods

LEASE—*continued.*

course. Court of Review will not appoint time, &c., for bankrupt to surrender; that is the office of commissioner. Where bankrupt allowed costs of surrender out of his estate. *Ex parte and re Tarleton*, Mont. & Chit. 677.

LEX LOCI CONTRACTUS, OR REI SITÆ.

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LIEN.

1. A., a creditor, strikes a docket, and then abandons it, in order to give effect to a subsequent trust composition deed, of which he becomes a trustee and expends money of his own in execution of the trust. A fiat subsequently is issued by another creditor: Held, that A. having knowledge of an act of bankruptcy when he accepted the trust, had no lien on the estate in his hands for his advances. *Semble secus*, if he had been ignorant or mistaken as to the act of bankruptcy under which he struck the docket.

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4. D. being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship, on the 18th of October, while the ship was on her voyage home. D. being indebted to the owner gave him a written order as follows:—"I hereby authorise you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th of December, and a fiat in bankruptcy was issued against D. on the 18th, on an act of bankruptcy committed on the 2d: Held, that D.'s assignees could not recover against the owner in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

The pendency of a petition before the Lord Chancellor to annul

JOINT STOCK BANKING
COMPANY—*continued.*

must be taken together; and that therefore the company might issue such fiat by their registered officer. *Quære*, Whether, under the 7 Geo. 4. c. 46., a company could sue a member of it at law in respect of an unsettled partnership debt, precluding set-off? *Semble*, not. Per Sir G. Rose?

Quære, Whether the 7 Geo. 4. and 1 & 2 Vict., taken together, do not convert an equitable debt due from one member of a company to the body, into a legal debt for all purposes, by taking away the right of set-off?

Quære, Whether the 7 Geo. 4. and 1 & 2 Vict., excluding the right of a partner in a company to set-off, was intended to apply to cases only of bills of exchange, due by the partner, on pure banking accounts, and not to transactions involving the account of capital? *Semble*, not. *Ex parte* and re *Hall*, Mont. & Chit. 365.

5. H., a shareholder, becomes largely indebted to the N. and C. Bank for calls, and (to a small extent) on his banking account. H., by deed reciting he was so indebted, gives security to cover the debt by equitable mortgage and other property. The company bring an action against him by their registered officer, under the 7 Geo. 4. c. 46., for the amount claimed, but abandon that action, and then file a bill praying an account and sale of securities. The 1 & 2 Vict. c. 110., then passing, they swear an affidavit of debt to the full amount claimed, and cause H. to commit an act of bankruptcy under section 8. The other shareholders had not paid up their calls, and the company was so far solvent

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that H.'s shares would, if sold, considerably reduce the balance against him. A fiat issues, and is proceeded with to the second meeting; but no creditors other than the company appearing (H. swearing that, except to the company, he did not owe 1*l.* in the world), no choice of assignees could take place. On petition by H., looking at the fiat as process (although good at law), and upon equitable principles, fiat was superseded. *Erskine C. J. Dubit. Quære*, Whether the Court ought not to put the creditor to his election between the fiat and the suit in equity. *Ex parte*, re *Hall*, Mont. & Chit. 365.

6. Held, that the estate of a partner in a joint stock company, who has become bankrupt, and against whom judgment has not been obtained pursuant to 7 G. 4. c. 46. ss. 9. 12. and 13., is liable to the claims of a creditor of the company; bankruptcy being a statutory execution.

No difference between a banking company under 7 G. 4. c. 46. and an ordinary partnership as regards the effect of 6 G. 4. c. 16. s. 62.; and a creditor of the company may prove against the separate estate of an individual member for the purposes of the latter section. A banking company under 7 G. 4. c. 46., though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 G. 4. c. 16. s. 62. Evils of joint stock companies, as regards the certificates of individual members becoming bankrupt, pointed out. *Ex parte Marston* and *Ex parte Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

7. Money due for calls in respect of shares in a joint stock bank does not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder without an account first taken. *Ex*

3 B

INSOLVENCY—*continued.*

(after acquired property) had been suffered to remain in the order and disposition of the bankrupt by the consent and permission of the true owner, and therefore passed under the 7 G. 4. c. 57. s. 30. to the assignees of the Insolvent Debtors' Court; the bankrupt having taken the benefit of that act. *Butler v. Hobson*, 5 Scott, 798. S. C. 5 Bing. N. C. 128.

3. In a suit by the assignee under the Insolvent Debtors' Act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff: and he is not rendered competent by the 3 & 4 W. 4. c. 42. ss. 26, 27. *Holden v. Hearn*, 1 Beavan, 445.

4. Money in court belonging to a married woman ordered to be applied for the benefit of herself and children, the husband having taken the benefit of the Insolvent Act. *Brett v. Greenwell*, 3 You. & Coll. 230.

See also DECLARATION OF INSOLVENCY.

INTERPLEADER.

Semble, notice by the solicitor to the petitioning creditor, that a fiat has been issued against a party whose goods, or the proceeds of them, are in the hands of the Sheriff under an execution, is not a sufficient claim of the goods to warrant an application for a rule to interplead. *Tarleton v. Dumelow*, 5 Bing. N. C. 110.

JOINT ESTATE WHAT.

A. and B. partners; A. dies, there being then joint property in hands of A. and B.'s bankers; towards execu-

tion of a previous arrangement, B. for partnership purposes, draws on bank, and hands money to trustees; and on agreement that if object of trust failed, money should be returned; A. fails, and B. becomes bankrupt; money remaining in trustees' hands: Held, that the money is the joint property of A. and B. applicable to their joint debts, and not the property of B. alone, as surviving partner. *Ex parte Leaf*, re *Simpson*, Mont. & Chit. 662.

JOINT STOCK BANKING COMPANIES.

1. Quære, Whether one partner can avail himself of the statute, 1 & 2 Vict. c. 96., against his co-partner, without there having been a balance struck, and a debt ascertained to be due from the latter. *Ex parte and re Brown*, Mont. & Chit. 199.

2. Semble, a party taking shares in a joint stock banking company merely in order to create a trading to found fiat, cannot maintain the fiat on such a trading: but it would be sufficient to maintain it adversely against such party. *Ex parte Brundrett*, 3 Mont. & Ayr. 50. *Ex parte and re Hall*, Mont. & Chit. 365.

3. A banking company, established according to 7 Geo. 4. c. 46., but afterwards opening a house of business in London, contrary to the act, do not debar themselves of the powers given by the act to sue by their registered officer, one of their own directors. *Ex parte and re Hall*, Mont. & Chit. 365.

4. Quære, Whether, under the 7 Geo. 4. c. 46. and 1 & 2 Vict. c. 96., a joint stock bank can sue out a fiat against a shareholder, upon a debt due in respect of an unsettled account, precluding the debtor's right of set-off? Held, that the two acts

JURISDICTION—continued.

of the lessor to B. and Co., in order to give them an equitable mortgage upon it, as between B. and Co. and the lessee. The lessee became bankrupt, and the creditors' assignees sold the lease, and paid off the mortgage with the purchase-money. The official assignee had nothing to do with the sale, except signing the conveyance. There were no other assets: Held, the official assignee was not entitled to any percentage on the fund: but held, that the Court had no jurisdiction on the mere question of the quantum of the allowance. The official assignee's accounts, and the commissioners' allowance of percentage to him, ought to be filed with the proceedings. *Ex parte Whisson, re Carter, Mont. & Chit. 274.*

9. Where the Court of Review supersedes a fiat, the Lord Chancellor cannot order a procedenda without examining merits of order of the Court of Review, ergo, without an appeal. *Re Hall, Mont. & Chit. 489.*

10. A party having been committed for contempt for disobedience to an order of this Court, requiring him to pay certain costs awarded against him, by a previous order of the Lord Chancellor in this matter, petitions the Court of Review for his discharge on the following grounds: — 1. That this Court had no jurisdiction to deal with any order of the Lord Chancellor, as for a contempt. 2. That the affidavit in support of the petition, on which the order for commitment was obtained, was sworn before the petition was presented. 3. That the order of commitment, in the wording of it, appeared to have been made on the "intention" of the party applying for it, instead

of on the petition of such party: Held, that these were not sufficient objections to the validity of the commitment. *Ex parte Green, re Elgie, 3 Dea. 700.*

11. A party, on his examination before the commissioners, was compelled by them to produce a book, which was lawfully in his possession, and which, on being produced, the assignees laid their hands on, and refused to return.

The Court, without entering into the question as to who had the legal title to the book, ordered it to be delivered up to the party, who had the lawful possession of it, when it was produced before the commissioners. *Ex parte Gilbard, re Malachy, 3 Dea. 488.*

12. When the Court makes an order that a creditor shall be permitted to prove for a certain sum, the commissioner cannot decline to receive the proof until a private meeting has been called to inquire into the nature of the debt. *Ex parte Richardson, re Clagett, 3 Dea. 377.*

Of Lord Chancellor.

13. Quære, whether the Court of Review having superseded a fiat, and the petitioning creditor having been offered a special case, alleged by him to be erroneous in omitting material facts, and in inserting as finding of the Court matters which were not found, and the petitioning creditor rejecting the special case, the Lord Chancellor has any original jurisdiction to try the validity of the fiat? Leave given to discuss the point before the Lord Chancellor on motion or petition without prejudice to question, whether at all events a petition is not necessary. The 1 & 2 W. 4. c. 56. s. 19. was not intended to revest in the Lord Chancellor the

JOINT STOCK BANKING
COMPANY—*continued.*

parte Snape, re Ransford, Mont. & Chit. 607.

8. A. appeared, by the return under the joint stock banking act, 7 G. 4. c. 46., to be a shareholder up to November, 1838. He then agreed to assign his shares to B., who was appointed by the company a director in respect of those shares. In February, 1839, the company indorse bills to petitioners. No new return is made under the 8th section, and not till March is the deed of transfer executed between A. and B. Held, that A. continued a partner to the world until March, and therefore liable under the proviso in the 1st section to payment of the bills. Proof against A.'s estate admitted. *Ex parte Prescott, re Phillips, Mont. & Chit. 611.*

9. In assumpsit by the directors of a joint stock company, constituted by deed, the deed must be produced to show who are the directors; and it is not sufficient to shew that the plaintiffs are the persons acting as directors. A director who has become bankrupt must nevertheless be joined as plaintiff, even though he has ceased to act, unless it be shewn that he has vacated his office. *Phelps v. Lyle, 2 Per. & D. 314.*

JURISDICTION.

1. The Court ought to exercise a discretion as to the certificate, upon which it decides, not ministerially, but judicially. *Per Sir J. Cross. Ex parte May, re Malachy, Mont. & Chit. 18.*

2. If the certificate do not disclose that it was signed after the last examination, it is defective. *Per Sir J. Cross.* But the Court can

send it back to the commissioners to be set right. A creditor has no right to object to a certificate on the ground of such informality. *Per Sir G. Rose. S. C. id.*

3. Upon the resignation of a registrar who has taken the benefit of the insolvent act, the Court of Review will not order the payment of arrears of salary to the registrar, upon the refusal of the insolvent assignee to receive it. 4th November, 1839, Lord Chancellor made the order without any objection. *Ex parte and re Bougfield, Mont. & Chit. 41.*

4. If parties agree upon an order out of Court, the Court cannot decide the question of costs between them without opening the whole case. *Ex parte Bate, re Gough, Mont. & Chit. 58.*

5. Upon the bankruptcy of an executor the Court will secure the fund, but has not jurisdiction to direct payment to the several creditors of the testator. *Ex parte Williams, re Knight, Mont. & Chit. 91.*

6. Quære, Whether the Court of Review can, upon petition, order a prisoner to be discharged? *Ex parte and re James, Mont. & Chit. 165.*

7. The affidavit of debt, under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was not filed till after the notice required by that section of its being filed, was served. The twenty-one days from the filing of the affidavit had not expired: Held, that, as the creditor might still give a fresh notice, the debtor could not take the affidavit off the file, though the Court had jurisdiction so to order: Held, a motion is the proper form of application for that purpose. *Ex parte and re Gibson, Mont. & Chit. 255.*

8. When a lease was granted it passed immediately from the solicitor

LACHES—*continued.*

Party obtaining leave to appeal ordered to elect within a given time, whether he would proceed with it or not. *Ex parte Pollard, re Courtney, Mont. & Chit. 643.*

4. A petition by a creditor, to annul the fiat, must state not only that he was a creditor when the fiat issued, but that he is still a creditor. And where a creditor delayed three years before he made the application, the Court would grant no indulgence to such an informality. *Ex parte Sandall, 3 Dea. 275.*

5. The Court will not stay the bankrupt certificate, until the determination of an action brought by the petitioner against a third party, for the purpose of realising a portion of his debt, where the petitioner did not appear to have used due diligence in proving the remainder of his debt. *Ex parte Pheasant, re Sherwood, 3 Dea. 625.*

LEASE.

A lessee under an unwritten contract reserving rent on 6th April, and 6th October, became bankrupt, and a fiat issued in March, the rent due in the previous October having been paid. Upon the assignees refusing to accept the premises, the bankrupt offered within fourteen days after his receiving notice of such refusal, and one day before 6th April, to deliver up possession to the lessor: Held that, under stat. 6 G. 4. c. 16. s. 75., he was not liable in assumpsit for use and occupation to pay anything in respect of the time subsequent to 6th October. Where the bankrupt holds by an unwritten lease, offering possession is a delivery within sect. 75. *Slack v. Sharpe, 8 Adol. & Ell. 366.*

LENGTH OF TIME.

1. A bankrupt having granted an annuity ten years since, and paid it for ten years, until his bankruptcy, and having at the time of granting it signed an account with the grantor, showing what the consideration was, is precluded from questioning the validity of that consideration, and so are his assignees. *Ex parte Fairman, re Lloyd, Mont. & Chit. 125.*

2. Court will not act on a certificate of commissioners, made in 1828, without referring it back for their review. *Ex parte, re Marin din, Mont. & Chit. 282.*

3. Commission so old as 1804: assignees dead. Court will not supersede, on composition to all creditors who could be found, and payment into Court of amount of debts of those who could not, without a new choice of assignees. Proceedings being lost, commissioners to call meeting for choice, &c., upon the footing of a list of debts proved. *Ex parte, and re Monk, Mont. & Chit. 637.*

4. Insolvency in 1828, commission in 1831, and fiat in 1836, against party who had paid no dividends under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor, under fiat of 1836, that order discharged, and payment of dividend ordered. Costs out of estate. *Ex parte Catchpole, re Rickaby, Mont. & Chit. 640.*

5. After twenty-three years contumacy, bankrupt allowed to surrender. Such an order is almost of

JURISDICTION—*continued.*

duty of trying questions of supersedeas, on his original jurisdiction; but to protect the great seal from being called upon to obey the order of another court. *Re Hall*, Mont. & Chit. 489.

14. The Court of Review having on the bankrupt's petition made an order to *annul the fiat*, instead of to *reverse the adjudication* merely, and the fiat having been annulled by the Lord Chancellor in pursuance thereof according to the usual practice, the petitioning creditor applied for a special case; but owing to the shape in which it was settled, declined to avail himself of it, and addressed an original petition to the Lord Chancellor, praying that *his order* annulling the fiat, might be discharged, because founded on an order of the Court of Review, which that Court had no jurisdiction to make, and praying for a writ of *prosedendo*. The question of supersedeas turned on questions of fact. Held, that this was in substance an application to try the merits of the supersedeas: that the Lord Chancellor had no original jurisdiction to do so, the parties having been before the Court of Review; that they were bound by the special case as settled, which settlement was final, and the Lord Chancellor could not go into the question of its propriety, or exercise the discretion given him by section 3. to hear the cause, otherwise than by special case. *Ex parte Stubbs*, *re Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

Court of Review.

1. It having been the constant practice of the Court of Review to direct that fiats be annulled, "if the Lord Chancellor shall think fit," and

not merely to confine their order to the reversal of the adjudication under the 17th section, that practice is confirmed and approved by the Lord Chancellor. *Ex parte Stubbs*, *re Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

2. *Arguendo*, Court of Review has no power to annul a fiat only to reverse adjudication. *Id. ib.*

3. The 1 & 2 W. 4. c. 56. s. 17. incidentally assumes that the Court of Review has power to try all questions of supersedeas. Per Lord Chancellor. S. C. *Id.* 542. S. C. 3 Dea. 549.

4. Where proof of debt has been tendered by affidavit, and commissioners are not satisfied; but require creditor to attend for examination, although she be very infirm and old, and unable to travel, all this Court can do is to give a commission in aid to take examination at creditor's own residence. *Ex parte Shaw*, *re Kirkby*, Mont. & Chit. 624.

LACHES.

1. Mere delay is not an objection to carrying a former order into effect. *Ex parte* and *re Evans*, Mont. & Chit. 92.

2. A year suffered to elapse, and acts of acquiescence before petition to annul by bankrupt presented. Petition dismissed. *Ex parte* and *re Forrester*, Mont. & Chit. 637.

2. Where, from a judgment of the Lord Chancellor on a special case, leave had been given to appeal to the House of Lords three months back, and no steps had been taken towards prosecuting the appeal, and no application made to stay proceedings, quære, whether the Court of Review is justified in refusing to make directions consequential on the Lord Chancellor's judgment.

LIS PENDENS—*continued.*

a renewed fiat is no objection to the hearing of a petition to sustain it, and supersede a renewed commission of prior date; nor is it a sufficient objection, that the petitioning creditor under the latter is not served. The superseding such a commission is merely a question of convenience to the estate, and if the commissioners named in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed fiat. Ex parte *Higgs*, re *Evans*, Mont. & Chit. 94.

LUNACY.

1. A., a creditor of B. and C., gives D. a general power of attorney for the management of his affairs, dated 4th July, 1834, under which D. consents to an arrangement between B. and C., on the dissolution of their partnership, that C. should become solely responsible for A.'s debt. That being still unpaid, C. becomes bankrupt, B. remaining solvent, and D. proves the debt against the separate estate of C. After the fiat, A. is found to have been lunatic since 1st of July, 1834. On petition to expunge, on the ground that D.'s adoption of C., as sole debtor, was under a void power, and without authority, and that B. remained solvent, and therefore liable: Held, that the proof was properly made. Lunacy is not, per se, a revocation of power of attorney. Ex parte *Bradbury*, re *Walden*, Mont. & Chit. 625.

2. Bankrupt, having become lunatic, a next friend allowed to make the usual affidavit of absence of

fraud, &c., in obtaining allowance by, and consent of commissioners and creditors. Ex parte and re *Roberts*, Mont. & Chit. 653.

MERGER.

1. An equitable mortgage, with agreement for legal mortgage. Then an act of bankruptcy; then a legal mortgage: Held, legal mortgage invalid, but that equitable mortgage was not merged, but revived. Ex parte *Harvey*, re *Ravenscroft*, Mont. & Chit. 261.

2. Creditors having brought a joint action against the bankrupt and A. and B., and having promised bankrupt to plead bankruptcy, undertaking to release and discharge him, and having entered a nolle prosequi as to him, and obtained judgment by default against A., and verdict and judgment against B.; quære, whether the right against bankrupt's estate is not merged and gone in toto? Ex parte *Banerman*, re *Lomax*, Mont. & Chit. 569. S. C. 3 Dec. 476.

3. The bankrupts gave a joint and several promissory note for 2000*l.*, to secure advances made by their bankers, and when they were indebted to the bankers in 1957*l.*, one of the bankrupts mortgaged certain property to them to secure that sum, and all such further sums as might be advanced, to the extent of 3000*l.*, including the said sum of 1957*l.* At the time of the bankruptcy, the amount of the debt due to the bankers was 4365*l.* of which sum they realised the 3000*l.* under the mortgage: Held (*Erskine C. J.* dissent), that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of

LEASE—*continued.*

course. Court of Review will not appoint time, &c., for bankrupt to surrender; that is the office of commissioner. Where bankrupt allowed costs of surrender out of his estate. *Ex parte* and *re Tarleton*, Mont. & Chit. 677.

LEX LOCI CONTRACTUS, OR
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According to English law, an equitable mortgage was effected of Scotch property. The special case found, that "by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit:" Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors, being resident here, the property came to the hands of the assignees charged with the equity, and therefore they were bound to pay the mortgage debt out of the proceeds of the particular property. *Ex parte Pollard*, *re Courtney*, Mont. & Chit. 239.

LIEN.

1. A., a creditor, strikes a docket, and then abandons it, in order to give effect to a subsequent trust composition deed, of which he becomes a trustee and expends money of his own in execution of the trust. A fiat subsequently is issued by another creditor: Held, that A. having knowledge of an act of bankruptcy when he accepted the trust, had no lien on the estate in his hands for his advances. *Semble secus*, if he had been ignorant or mistaken as to the act of bankruptcy under which he struck the docket.

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3. A pawnbroker who, in taking pledges, omits to pursue the course required by 39 & 40 G. 3. c. 99. s. 6., acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a pawnor, who afterwards becomes bankrupt. *Fergusson v. Norman*, 5 Bing. N. C. 76. S. C. 6 Scott, 794.

4. D. being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship, on the 18th of October, while the ship was on her voyage home. D. being indebted to the owner gave him a written order as follows:—"I hereby authorise you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th of December, and a fiat in bankruptcy was issued against D. on the 18th, on an act of bankruptcy committed on the 2d: Held, that D.'s assignees could not recover against the owner in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

The pendency of a petition before the Lord Chancellor to annul

NOTICE—*continued.*

ing knowledge of an act of bankruptcy when he accepted the trust, had no lien on the estate in his hands for his advances. *Semble secus*, if he had been ignorant or mistaken as to the act of bankruptcy under which he struck the docket. *Ex parte Swinburne, re Field*, Mont. & Chit. 119.

3. *Semble*, notice by the solicitor to the petitioning creditor, that a fiat has been issued against a party whose goods, or the proceeds of them, are in the hands of the sheriff under an execution, is not a sufficient claim of the goods to warrant an application for a rule to interplead. *Tarleton v. Dumelow*, 5 Bing. N. C. 110.

4. A., on the behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C., as a security for a debt; and C. gave notice of the assignment to A., but not to B. The owner having subsequently become bankrupt, it was held that the arrears of freight were not in his order and disposition at the time of this bankruptcy. Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Myl. Cr. 129.

OFFICER OF COURT.

Upon the resignation of a registrar who has taken the benefit of the Insolvent Act, the Court of Review will not order the payment of arrears of salary to the registrar, upon the refusal of the insolvent assignee to receive it. 4th November, 1839, L. C. made the order without any objection. *Ex parte* and *re Bousfield*, Mont. & Chit. 41.

OFFICERS, PUBLIC.

The retiring pension of a military officer of the East India Company, does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

OFFICIAL ASSIGNEES.

1. When a lease was granted, it passed immediately from the solicitor of the lessor to B. and Co., in order to give them an equitable mortgage upon it, as between B. and Co. and the lessee. The lessee became bankrupt, and the creditor's assignees sold the lease, and paid off the mortgage with the purchase-money. The official assignee had nothing to do with the sale, except signing the conveyance. There were no other assets. Held, the official assignee was not entitled to any percentage on the fund; but held, that the Court had no jurisdiction on the mere question of the quantum of the allowance. The official assignee's accounts and the commissioner's allowance of percentage to him, ought to be filed with the proceedings. *Ex parte Whisson, re Carter*, Mont. & Chit. 274.

2. The official assignee of a bankrupt's estate filed a bill against the respective personal representatives

OFFICIAL ASSIGNEES—
continued.

of two successive assignees for an account and payment of monies which, having formed part of the bankrupt's assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The monies consisted partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both the assignees died before the passing of the 6 G. 4. c. 16. The bill was filed in 1834, and in the following year the 5 & 6 W. 4. c. 20. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified. Held, that the official assignee was competent to maintain such a suit, and that the particular creditors to whom the unclaimed dividends had been allotted and the Attorney-General were not necessary parties to it. *Green v. Weston*, 3 Myl. & Cr. 385.

3. The plaintiffs, who had been chosen assignees of a bankrupt, issued a scire facias to revive a judgment obtained by him before bankruptcy against the defendant, but omitted to make the official assignee a co-plaintiff. The Court, after plea pleaded and issue joined, allowed the proceedings to be amended by joining the official assignee, and held also, that in cases of such amendment the opposite party should always be allowed to plead de novo. *Holland v. Philipps*, 2 Per. & D. 336.

4. Where an official assignee was omitted to be made a defendant, liberty was given to the plaintiffs, at

the hearing, to amend the bill by adding parties. *Wood v. Wood*, 3 You. & Coll. 580.

ONUS PROBANDI.

1. Where a bankrupt petitioning to supersede for want of requisites to support fiat, has applied for copies, and seen the proceedings, the onus probandi of his case lies on him, and it is not sufficient to deny the requisites generally; and without his doing so, the respondent may rely on the proceedings alone. *Ex parte and re Ford*, Mont. & Chit. 97.

2. On a petition to supersede, the usual course is, after the petitioner's counsel has opened the petition, to call on the respondent to support the fiat, the onus probandi lying on him; but where the fiat issued under the 1 & 2 Vict. c. 110. s. 8., and the petition shewed that the affidavit of debt, and notice required by the act had been given, it is for the petitioner to shew, that the notice has been complied with, or a sufficient reason why not, the onus probandi lying on the petitioner. *Ex parte and re Brown*, Mont. & Chit. 194.

ORDER AND DISPOSITION.

1. A foreign merchant remits bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds. The factor sells the bills, but before the receipt of the purchase-money, becomes bankrupt and dishonours the merchant's drafts for the amount: Held, that the merchant, and not the factor's assignees, were entitled to the proceeds of the bills, notwithstanding the bills had been indorsed both by the principal

ORDER AND DISPOSITION— *continued.*

and the factor, and were sold by the factor in his own name. *Ex parte Pauli*, 3 Dea. 169.

2. A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C. as a security for a debt; and C. gave notice of the assignment to A., but not to B. The owner having subsequently become bankrupt, it was held the arrears of freight were not in his order and disposition at the time of his bankruptcy. Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; or, in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Myl. & Cr. 129.

ORDER GENERALLY.

1. Mere delay is not an objection to carrying a former order into effect. *Ex parte and re Evans*, Mont. & Chit. 92.

2. An error in Christian name of petitioning creditor occurring in one part of docket papers, though right in prior part, query, if material? But leave given to amend, without prejudice. That order not discharged except on notice of motion. In the matter of *Sale*, Mont. & Chit. 350.

3. When there is no variation between the minutes and the order, as

pronounced by the Court, the Court will not entertain an application to vary the minutes; the proper course for any party dissatisfied with the order being to apply for a re-hearing. *Ex parte Dolly*, 3 Dea. 51.

4. Where an order is made by the Court of Review under 6 G. 4. c. 16. s. 18., to cause a fiat in bankruptcy to be proceeded with, notwithstanding the petitioning creditor's debt has been found insufficient, the petition on which the order is made cannot be used to explain any ambiguity in the order. When, therefore, an order recited that G. H., public registered officer of the N. and C. bank, had petitioned the Court that the fiat should be proceeded with, and adjudicated that the debt of J. C. the petitioning creditor, was an insufficient debt, and that the debt of the N. and C. bank proved under the fiat was so incurred not anterior to the debt of the said banking company: Held, that the order was invalid, as it did not state distinctly that the debt of the N. and C. bank had been proved before the petition was made.

A clerical error, however, will not vitiate the order; Held, therefore, that stating the debt of the N. and C. bank to have been incurred not anterior to the debt of the said banking company (instead of J. C.), was immaterial. *Christie v. Unwin*, 3 Per. & D. 204.

ORDER, NUNC PRO TUNC.

Order made nunc pro tunc, to dispense with attendance of petitioning creditor at opening of fiat. *Ex parte, Whibley re Atkinson*, Mont. & Chit. 642.

PARTIES TO SUIT.

A. demised to B. (who was alleged to be an uncertificated bankrupt) a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance: Held, that neither A., nor the occupiers of the adjoining wharfs, nor the assignees of B., were necessary parties to the bill. *Semple v. The London and Birmingham Railway Company*, 9 Sim. 209.

PARTNERS AND PARTNERSHIP.

1. Three partners; one becomes bankrupt, another petitions to stay certificate, and to have accounts taken as between him and the bankrupt. Per Sir G. Rose. The third partner must be served with the petition. *Ex parte May, re Malachy*, Mont. & Chit. 18.

2. Upon the formation of a new firm, the separate debt of one of the firm does not, without express agreement, become the joint debt of the new firm. *Ex parte Hitchcock, re Worth*, Mont. & Chit. 60.

3. A. and B. secretly partners, using the one his name as drawer, and the other his as acceptor of bills. Inquiry directed as to their general habit, and whether they intended thereby to bind the partnership estate. *Ex parte Law, re Bazley*, Mont. & Chit. 111.

4. Quære, whether one partner can avail himself of the statute 1 & 2 Vict. c. 96. against his co-partner, without there having been a balance struck, and a debt ascertained to be due from the latter. *Ex parte and re Brown*, Mont. & Chit. 199.

5. H., a shareholder, becomes largely indebted to the N. and C. bank, for calls, and (to a small extent) on his banking account. H. by deed reciting he was so indebted, gives security to cover the debt by equitable mortgage and other property. The company bring an action against him by their registered officer, under the 7 G. 4. c. 46., for the amount claimed, but abandon that action, and then file a bill, praying an account and sale of securities. The 1 & 2 Vict. c. 110. then passing, they swear an affidavit of debt to the full amount claimed, and cause H. to commit an act of bankruptcy under section 8. The other shareholders had not paid up their calls, and the company was so far solvent that H.'s shares would, if sold, considerably reduce the balance against him. A fiat issues, and is proceeded with, to the second meeting; but no creditors other than the company appearing, (H. swearing that, except to the company, he did not owe 1*l.* in the world,) no choice of assignees could take place. On petition by H. looking at the fiat as process (although good at law), and upon equitable principles, fiat was superseded. *Erskine, C. J. dubit.* Quære, whether the Court ought not to put the creditor to his election between the fiat and the suit in equity. *Ex parte and re Hall*, Mont. & Chit. 365.

6. Quære, whether under the 7 G. 4. c. 46. and 1 & 2 Vict. c. 96. a joint stock bank can sue out a fiat against a shareholder, upon a debt due in respect of an unsettled account, precluding the debtor's right of set-off? Held, that the two acts must be taken together, and that therefore the company might issue such fiat by their registered officer. Quære, whether under the 7 G. 4. c. 46. a company could sue a mem-

PARTNERS AND PARTNER-
SHIP—continued.

ber of it at law, in respect of an unsettled partnership debt precluding set-off? Semble, not. Per Sir G. Rose. Quære, whether the 7 G. 4. and 1 & 2 Vict., taken together, do not convert an equitable debt due from one member of a company to the body into a legal debt for all purposes, by taking away the right of set-off? Quære, whether the 7 G. 4. and 1 & 2 Vict., excluding the right of a partner in a company to set-off, was intended to apply to cases only of bills of exchange, due by the partner on pure banking accounts, and not to transactions involving the account of capital? Semble not. *Id ib.*

7. Whether 6 G. 4. c. 16. s. 62. applies where the partnership has ceased to exist? A banking company, under 7 G. 4. c. 46., though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 G. 4. c. 16. s. 62. Ex parte *Marston* and ex parte *Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

8. A. appeared, by the return under the Joint Stock Banking Act, 7 G. 4. c. 46., to be a shareholder up to November, 1838. He then agreed to assign his shares to B., who was appointed by the company a director in respect of those shares. In February, 1839, the company indorse bills to petitioners. No new return is made under the 8th section, and not till March is the deed of transfer executed between A. and B.: Held, that A. continued a partner to the world until March, and therefore liable under the proviso in the 1st section to payment of the bills. Proof against A.'s estate admitted.

Ex parte *Prescott*, re *Phillips*, Mont. & Chit. 611.

9. A. and B. partners; A. dies, there being then joint property in hands of A. and B.'s bankers; towards execution of a previous arrangement, B., for partnership purposes, draws on bank, and hands money to trustees, and on agreement that if object of trust failed, money should be returned; it fails, and B. becomes bankrupt; money remaining in trustees' hands: Held, that the money is the joint property of A. and B. applicable to their joint debts, and not the property of B. alone as surviving partner. Ex parte *Leaf*, re *Simpson*, Mont. & Chit. 662.

10. H. deposits with W., his agent, Virginian bonds for 50,000 dollars, which W., in July, 1836, pledged with a third person, as a security for his own debt. In September, 1836, H. applies to W. to grant him a credit for 10,000*l.* on the security of the Virginian bonds, which W. agrees to do, but says nothing about having previously pledged them for his own purposes. On the 1st October, 1836, H. draws bills on W. to the amount of 10,000*l.*, which are deposited by W. and C., W. having taken C. into partnership on the very day the bills were drawn, and the bills are duly paid by W. and C. at maturity, H., at the request of W. and C., remitting 7000*l.* towards the payment of them. Subsequent dealings take place between H. and W. and C., until the latter stop payment, when they make a balance to be due to them from H., but take no notice of the Virginian bonds, the chief part of which had been already redeemed by W. and C., and pledged again with another person, for a partnership debt, from W. and C.: Held, that the subsequent dealings of H. with the partnership of W.

PARTNERS AND PARTNER-SHIP—*continued.*

and C. did not deprive him of his right to prove the amount of the bonds, against the separate estate of W. Ex parte *Meinerzhagen*, 3 Dea. 101.

See also SOLVENT PARTNER—SUBSTITUTION OF DEBTORS.

PARTIES ABROAD.

See ABROAD, CREDITORS RESIDING.

PAYMENT BY MISTAKE.

C. a trader, on the 5th of June, 1838, assigned his effects in trusts for the benefit of creditors, on the same day (but before the execution of the assignment) a fi. fa. against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on the 6th. The trustees under the assignment paid him the amount of the levy under protest, and he withdrew from possession. It afterwards appeared that C. had committed an act of bankruptcy on the 2d of June, upon which a fiat issued on the 18th: Held, that the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fiat. *Harris v. Loyd*, 5 Mee & Wels. 432.

PAWNBROKER.

A pawnbroker who, in taking pledges, omits to pursue the course required by 39 & 40 G. 3. c. 99. s. 6., acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a pawner who afterwards becomes bankrupt. *Fergusson v. Norman*, 5 Bing. N. C. 76. S. C. 6 Scott, 794.

PENSION.

The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. C. 262.

PETITION.

What done by.

1. Quære, whether the Court of Review can, upon petition, order a prisoner to be discharged? Ex parte and re *James*, Mont. & Chit. 165.

Form of.

2. Petition to expunge proof by a bankrupt must show that the surplus or amount of his allowance will be affected. Leave to amend. Ex parte and re *Pitchforth*, Mont. & Chit. 96.

3. An application to remove a fiat, and, if not, that the petitioning creditor's affidavit may be received, cannot be united in the same application. Re *Wright*, Mont. & Chit. 144.

4. What is sufficient averment in a petition to let in evidence of particular facts. It is sufficient to state a fact, and give in evidence the circumstances on which the conclusion of fact is founded. Ex parte and re *Brown*, Mont. & Chit. 203.

5. Allegation in petition, that petitioner is a creditor, assumes, unless denied, that he has proved. Ex parte *Fosbrooke*, re *Fisher*, Mont. & Chit. 298.

6. A petition to supersede a joint fiat (one only having been declared bankrupt), and the affidavits in support being entitled in the matter of the one so declared only:—Held defective, but leave given to amend. Ex parte and re *Fisher*, Mont. & Chit. 345.

PETITION—*continued.**Amending.*

7. A petition praying a supersedeas being called on, the advertisement pro tem. was stayed, and the hearing stood over. The petitioners then, by leave of the Court, filed "a supplemental petition," but stating facts which might have been introduced into the original. Semble, that it cannot be made use of on the subsequent hearing; a motion to amend would have been the more proper course. *Ex parte* and *re Brown*, Mont. & Chit. 195.

Standing over.

8. An application for appropriation of funds under a separate fiat, need not stand over, because a subsequent joint fiat has issued, under which a petition to supersede the separate fiat is pending. *In re Had-don*, Mont. & Chit. 42.

9. If a petitioner has not his affidavit of service in Court, the petition can only stand over generally. *In re Crossley*, Mont. & Chit. 93.

10. The mere circumstance of a petition being ordered to stand over, on the application of a party, does not prevent that party from filing fresh affidavits. *Ex parte Worthing-ton*, *re Oulton*, 3 Dea. 332.

Service.

11. The certificate will be allowed, if the petition to stay it, charging the assignee with fraud in obtaining the allowance, is not served on the assignees. *Ex parte May*, *re Malachy*, Mont. & Chit. 18.

12. Three partners; one becomes bankrupt, another petitions to stay certificate, and to have accounts taken as between him and the bankrupt. *Per Sir G. Rose*. The third

partner must be served with the petition. *Id. ib.*

13. The pendency of a petition before the Lord Chancellor to annul a renewed fiat, is no objection to the hearing of a petition to sustain it, and supersede a renewed commission of prior date; nor is it a sufficient objection, that the petitioning creditor under the latter is not served. The superseding such a commission is merely a question of convenience to the estate, and if the commissioners named in it have removed to such a distance that they cannot properly proceed in their duty (100 miles), it will be superseded, and the proceedings under it transferred to the renewed fiat. *Ex parte Higgs*, *re Evans*, Mont. & Chit. 94.

14. A bankrupt cannot be heard on a petition to prove pro or con, and, if served, must be paid his costs of appearance. *Ex parte Fairman*, *re Lloyd*, Mont. & Chit. 125.

15. To entitle a petitioner to an order to prove in the absence of an appearance for assignees, service of the petition on the solicitor to fiat, who had undertaken to accept service, is not sufficient; it must be served on them personally. *Ex parte Baker*, *re Scott*, Mont. & Chit. 156.

16. A petition by one assignee to tax a bill, must be served on the other assignees. *Ex parte Fosbrooke*, *re Fisher*, Mont. & Chit. 176.

17. A., B., and C., partners; A. bankrupt, B. bankrupt, A., B., and C., bankrupts. Under the separate fiats part of the joint estate had been administered, and a dividend declared. No separate estates, or debts. Order to incorporate the separate under the joint fiat, and to stay proceedings thereunder, and liberty to review the choice of assignees. Bankrupts need not be

PETITION—*continued.*

served with petition for this purpose. *Ex parte Lister, re Haddon, Mont. & Chit. 260.*

18. On petition to declare bankrupt a trustee, and for conveyance of mortgaged premises, neither the assignees, bankrupt, nor heir of mortgagor, need be served. Being served, the petitioner must pay their costs. *Ex parte Smith, re Parker, Mont. & Chit. 598.*

19. Insolvency in 1828, commission in 1831, and fiat in 1836, against party who had paid no dividends, under first two processes, and had not obtained his certificate. Property taken under fiat of 1836, and dividend declared, but payment of it stayed till further order, to give time for those interested under first two processes to substantiate any claim. Nothing done for three years. On petition of creditor under fiat of 1836, that order discharged and payment of dividend ordered. Costs out of estate. Assignees under commission of 1831, need not have been served with latter petition, but having been served by respondents, the assignees under fiat of 1836, their costs also ordered to be paid out of the estate. *Ex parte Catchpole, re Rickaby, Mont. & Chit. 640.*

Supplemental.

20. A petition praying a supersedeas being called on, the advertisement pro tem. was stayed, and the hearing stood over. The petitioners then, by leave of the Court, filed "a supplemental petition," but stating facts which might have been introduced into the original. Semble, that it cannot be made use of on the subsequent hearing; a motion to amend would have been the more

proper course. *Ex parte and re Brown, Mont. & Chit. 195.*

To stay Certificate.

21. The certificate will be allowed, if the petition to stay it, charging the assignee with fraud in obtaining the allowance, is not served on the assignees. *Ex parte May, in re Malachy, Mont. & Chit. 18.*

22. Three partners; one becomes bankrupt, another petitions to stay certificate, and to have accounts taken as between him and the bankrupt. Per Sir G. Rose. The third partner must be served with the petition. *Ex parte, Id. ib.*

23. Costs given on dismissing a petition to stay certificate, though one of the judges differed in opinion from the rest of the Court. *Id. ib.*

24. Quære, Whether a petition to stay a certificate holds good before the certificate has been allowed or signed? *Ex parte and re Stocken, Mont. & Chit. 232.*

25. Petition to stay certificate attested thus, "Witness A. B., solicitor for the petitioners," held good. *S. C. Id. ib.*

To prove, Form of.

26. Semble, a petition to prove must state grounds why commissioner rejected the proof. *Ex parte Baker, re Scott, Mont. & Chit. 156.*

To supersede.

27. An application for appropriation of funds under a separate fiat need not stand over because a subsequent joint fiat has issued, under which a petition to supersede the separate fiat is pending. *Re Haddon, Mont. & Chit. 42.*

28. To supersede a joint commission when one of the bankrupts is dead, the administratrix should be a petitioner. *Re Steel, Mont. & Chit. 73.*

PETITION—*continued.*

29. Upon an application to supersede under the composition clause, it is not necessary that the commissioner shall certify that no creditor to the amount of 90*l.* resides out of the jurisdiction, or that the assignees have assented. *Ex parte and re Butterworth*, Mont. & Chit. 140.

30. On a petition to supersede, the usual course is, after the petitioner's counsel has opened the petition, to call on the respondent to support the fiat, the onus probandi lying on him; but where the fiat issued under the 1 & 2 Vict. c. 110. s. 8., and the petition shewed that the affidavit of debt, and notice required by the act, had been given, it is for the petitioner to shew that the notice has been complied with, or a sufficient reason why not, the onus probandi lying on the petitioner. *Ex parte and re Brown*, Mont. & Chit. 194.

31. A year suffered to elapse, and acts of acquiescence before petition to annul by bankrupt presented. Petition dismissed. *Ex parte and re Forrester*, Mont. & Chit. 637.

32. A petition by a creditor to annul the fiat, must state, not only that he was a creditor when the fiat issued, but that he is still a creditor. And where a creditor delayed three years before he made the application, the Court would grant no indulgence to such an informality. *Ex parte Sandall*, 3 Dea. 275.

See also FIAT SUPERSEDEAS.

PETITIONING CREDITOR
GENERALLY.

1. An application to remove a fiat, and, if not, that the petitioning creditor's affidavit may be received,
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cannot be united in the same application. *Re Wright*, Mont. & Chit. 144.

2. Leave, under circumstances, to same petitioning creditor, to issue a second fiat, time for prosecuting the first having expired. *Re Knibb*, Mont. & Chit. 290.

3. Petitioning creditor having, since the fiat, with perfect bona fides and in ignorance, received part of his debt from bankrupt, fiat declared valid, and to be proceeded in. *Ex parte Nesbit*, re *Mould*, Mont. & Chit. 362.

4. Quære, Whether, under the 7 Geo. 4. c. 46. and 1 & 2 Vict. c. 96., a joint stock bank can sue out a fiat against a shareholder, upon a debt due in respect of an unsettled account, precluding the debtor's right of set-off? Held, that the two acts must be taken together, and that therefore the company might issue such fiat by their registered officer. Quære, Whether, under the 7 Geo. 4. c. 46., a company could sue a member of it at law, in respect of an unsettled partnership debt, precluding set-off? Semble not. Per Sir G. Rose. Quære, Whether the 7 Geo. 4. and 1 & 2 Vict., taken together, do not convert an equitable debt due from one member of a company to the body into a legal debt for all purposes, by taking away the right of set-off? Quære, Whether the 7 Geo. 4. and 1 & 2 Vict., excluding the right of a partner in a company to set-off, was intended to apply to cases only of bills of exchange, due by the partner, on pure banking accounts, and not to transactions involving the account of capital? Semble not. *Ex parte and re Hall*, Mont. & Chit. 365.

5. Order made, nunc pro tunc, to dispense with attendance of petitioning creditor at opening of fiat. *Ex*

PETITIONING CREDITOR
GENERALLY—*continued.*

parte *Whitley*, re *Atkinson*, Mont. & Chit. 642.

6. Petitioning creditor's duty as to proceeding to the choice of assignees.

When the petitioning creditor will be appointed assignee by the Court.

Quære, Whether the petitioning creditor may take security for a certain amount of his debt, and prove for the difference. Ex parte and re *Hall*, Mont. & Chit. 463, 464.

7. The petitioning creditor issued a fiat on the 20th December, 1837, but forbore to prosecute it, to enable the bankrupt, who had some disputes pending with his partner, to settle them by arbitration. The award was not made till the 14th February, 1839, when the petitioning creditor applied for leave to issue another fiat; but the application was refused both by the Court of Review and the Lord Chancellor. Ex parte *Foljambe*, re *Hewitt*, 3 Dea. 628.

8. Depositions made by a witness sent by the petitioning creditor to prove an act of bankruptcy before the commissioners, are admissible in evidence against the petitioning creditor in any subsequent action against him, although the witness is still living. *Gardner v. Moult*, 2 Per. & D. 403.

Who may be.

9. Second fiat issued by the same petitioning creditor. Ex parte *Partridge*, re *Knibb*, Mont. & Chit. 165.

10. A creditor assenting to an act of bankruptcy, cannot avail himself of it to support a fiat. Ex parte and re *Brown*, Mont. & Chit. 208.

11. Party to deed creating the act of bankruptcy cannot be petitioning creditor. Re *Cook*, Mont. & Chit. 349.

12. If a creditor, who is a party to a deed of assignment of a trader's property for the benefit of his creditors, issue a fiat against him, it will be annulled with costs. Ex parte *Bunn*, 3 Dea. 119.

Bond amending.

13. Petitioning creditor's bond amended. Re *Dulcken*, Mont. & Chit. 73.

14. The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. Re *Lees*, 3 Dea. 36.

Debt generally.

15. The Court will permit a mere verbal inaccuracy in the affidavit of the petitioning creditor to be amended; and will not stay the issuing of the fiat, at the instance of another creditor competing for it, on account of an alleged irregularity in the bond. Re *Lees*, 3 Dea. 36.

16. A fiat founded on a bill due to a solicitor before taxation is good *prima facie*, if afterwards, on taxation, it is reduced below 100*l*. Semble, the fiat will be superseded. Ex parte and re *Ford*, Mont. & Chit. 97.

17. Quære, How far a debt is suspended at law by the subsistence of a trust deed for the benefit of creditors, signed by the creditors, and still only in fieri, so as to become incapable of sustaining a fiat. Ex parte and re *Brown*, Mont. & Chit. 213.

18. Upon a question of quantum of a petitioning creditor's debt consisting of a bill of costs, the Court has no power to inquire into the conduct of the solicitor in the proceedings out of which it arose, though

PETITIONING CREDITOR
GENERALLY—*continued.*

alleged he had been guilty of gross neglect and misconduct. *Ex parte* and *re Southall*, Mont. & Chit. 346.

19. The petitioning creditor's debt was, by mistake, sworn to be a joint debt: Fiat had been taken out in the name of two, and had been opened: Court refused liberty to amend the fiat; but gave liberty to take out a new fiat. *Ex parte Rhands, re Morris*, Mont. & Chit. 348.

20. Petitioning creditor's debt on bill not in the hands of the petitioning creditor at the date of the fiat, bad; another debt substituted at the cost of the petitioning creditor. *Ex parte Cattley, re Goodwin*, Mont. & Chit. 360.

21. A petitioning creditor's debt made up of a sum paid in part discharge of a bill, and the remainder unpaid, and the bill being in the hands of an adverse holder, bad. *Ex parte Caldecott, re Heath*, Mont. & Chit. 600.

22. Money due for calls in respect of shares in a joint stock bank does not constitute such an ascertained debt as to allow the company to prove against a bankrupt shareholder without an account first taken. *Ex parte Snape, re Ransford*, Mont. & Chit. 607.

23. Part of a petitioning creditor's debt contracted during trading, and part since, not sufficient to support fiat. *Secus*, if part before trading and remainder during its continuance. *Re Dolly*, Mont. & Chit. 636.

24. Petition to supersede, charged that petitioning creditor's debt was composed of bill of costs of attorney in action. Petitioner contended that, through negligence, the cause was lost, and business useless, and that attorney agreed to take costs out of

pocket only (see *antè*, page 346.). Reference by consent to Registrar to tax costs, having regard to question of negligence, and to ascertain what due, and state special circumstances: Held, he ought to have considered the contract, and to have taxed accordingly, and that the order of reference so taken by consent was no waiver of the objection founded on the contract. *Ex parte* and *re Southall*, Mont. & Chit. 656.

25. Under 6 G. 4. c. 16., where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the commission to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount. *Byers v. Southwell*, 6 Bing. N. C. 39.

26. In an action against a sheriff for a false return of nulla bona to a writ of fieri facias, in which the question is, whether the goods of the debtor had passed to his assignees under his bankruptcy, the defendant need not put in the deposition of the petitioning creditor, to shew what the petitioning creditor's debt was; nor is the defendant limited to the debt only, which is stated in the deposition of the petitioning creditor. *Birt v. Stephenson*, 8 Car. & P. 741.

Substitution of.

27. Petitioning creditor's debt on bill, not in the hands of the petitioning creditor at the date of the fiat, bad; another debt substituted at the cost of the petitioning creditor. *Ex parte Cattley, re Goodwin*, Mont. & Chit. 360.

28. Under 6 G. 4. c. 16., where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the commission to be proceeded in, on proof

**PETITIONING CREDITOR
GENERALLY—continued.**

of a sufficient debt by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount. *Byers v. Southwell*, 6 Bing. N. C. 39.

29. Where an order is made by the Court of Review, under 6 G. 4. c. 16. s. 18., to cause a fiat in bankruptcy to be proceeded with, notwithstanding the petitioning creditor's debt has been found insufficient, the petition on which the order is made cannot be used to explain any ambiguity in the order. When, therefore, an order recited that G. H., public registered officer of the N. and C. bank, had petitioned the Court that the fiat should be proceeded with, and adjudicated that the debt of J. C., the petitioning creditor, was an insufficient debt, and that the debt of the N. and C. bank, proved under the fiat, was so incurred not anterior to the debt of the said banking company: Held, that the order was invalid, as it did not state distinctly that the debt of the N. and C. bank had been proved before the petition was made. A clerical error, however, will not vitiate the order: Held, therefore, that stating the debt of the N. and C. bank to have been incurred not anterior to the debt of the said banking company (instead of J. C.), was immaterial. *Christie v. Unwin*, 3 Per. & D. 204.

PLEADING.

1. In an action of trover for household furniture, &c., where the declaration stated that the plaintiff was possessed of the goods as of his own property, the defendants, who were the assignees of a bankrupt, pleaded,

1st., that they were not guilty of the conversion; and, 2dly, that the plaintiff was not possessed of the goods as of his own property; it was held at Nisi Prius, that, in order to admit evidence of the rights of the defendants, as assignees, on the ground that the goods were in the order and disposition of the bankrupt, that defence should have been specially pleaded; but the Court of Exchequer were of opinion that the defence relied upon was evidence, under the plea that the plaintiff was not possessed of the goods as of his own property. *Isaacs v. Belcher*, 8 Car. & P. 714. S. C. 7 Dowl. Pr. Ca. 516.

2. The protection given by the stat. 2 & 3 Vict. c. 29. s. 1., to contracts with bankrupts, and execution against their property bona fide executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods, as assignees, at the time of the alleged conversion. Semble, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Byers v. Southwell*, 9 Car. & P. 320.

PLEA OF BANKRUPTCY.

1. Where, in an action against defendant as a public officer of a company, he pleaded (together with other pleas), his bankruptcy, and that he ceased to be a public officer before action brought, the Court ordered such pleas to be struck out, upon an undertaking by the plaintiff, that he would not take out execution against

PLEA OF BANKRUPTCY—
continued.

defendant personally. *Semble*, that in such action, the Court will not allow a plea, denying that defendant was a public officer, without an affidavit of its truth. *Wood v. Marston*, 7 Dowl. Pr. Ca. 865.

2. The bankruptcy of a sole plaintiff, before action, is an issuable plea. *Willis v. Hallett*, 5 Bing. N. C. 465. S. C. 7 Scott. 474.

3. The defendant, after pleading his bankruptcy and certificate, puis darrien continuance, cannot force the plaintiff to reply, and the latter may discontinue the action without payment of costs. *Woollen v. Smith*, 1 Per. & D. 374.

PLEDGE.

A bankrupt, having within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money: Held, that the transaction, though *bonâ fide*, and without notice of an act of bankruptcy, was not protected by sect. 82. of 6 G. 4. c. 16., but that his assignees might recover the value in trover. *Wright v. Fearnley*, 5 Bing. N. C. 89. S. C. 6 Scott, 813.

POWER OF ATTORNEY.

1. A., a creditor of B. and C., gives D. a general power of attorney for the management of his affairs, dated 4th July, 1834, under which D. consents to an arrangement between B. and C., on the dissolution of their partnership, that C. should become solely responsible for A.'s debt. That being still unpaid, C. becomes bankrupt, B. remaining solvent, and D. proves the debt against

the separate estate of C., after the fiat. A. is found to have been lunatic since 1st July, 1834. On petition to expunge, on the ground that D.'s adoption of C., as sole debtor, was under a void power, and without authority, and that B. remained solvent, and therefore liable: Held, that the proof was properly made. Lunacy is not, *per se*, a revocation of power of attorney. *Ex parte Bradbury*, re *Walden*, Mont. & Chit. 625.

2. One power of attorney, from several creditors, is sufficient to authorise a party to sign a consent, on their respective behalves, to annul the fiat. *Anon.* 3 Dea. 377.

3. The institution of a suit, under sect. 88. of the bankrupt act, 6 G. 4. c. 16., may be authorised by creditors present by attorney, as effectually as by creditors present in person. *Bannatyne v. Leader*, 3 Myl. & Cr. 379.

To appoint.

4. A husband upon marriage settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or in default of a joint appointment, the survivor of them should appoint, with remainder in default of such appointment to the children of the marriage equally with remainder to the right heirs of the husband. The husband became bankrupt, and after his bankruptcy, he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill having been subsequently filed by a person claiming un-

POWER OF ATTORNEY—
continued.

der the bankruptcy for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favour of the same children, which she stated in her answer: Held first, that the joint appointment was inoperative on the ground that the husband could not by a subsequent execution of the power, deprive his assignees of an estate which had been once vested in them by his bankruptcy; secondly (by implication), that such joint appointment could not be considered as the separate appointment of the wife who survived; and thirdly, that the wife's separate appointment after the husband's death was a good exercise of the power; and that the account of the rents prayed by the bill could not be extended beyond the date of that appointment. *Hole v. Escott*, 4 Myl. & Cr. 187.

PRACTICE IN COURT.

1. On a petition to supersede, the usual course is, after the petitioners counsel has opened the petition to call on the respondent to support the fiat, the onus probandi lying on him; but where the fiat issued under 1 & 2 Vict. c. 110. s. 8., and the petition shewed that the affidavit of debt, and notice required by the act had been given, it is for the petitioner to shew that the notice had been complied with, or a sufficient reason why not, the onus probandi lying on the petitioner. Ex parte and re *Brown*, Mont. & Chit. 194.

2. Quære the policy of a judge suggesting an equity to the parties, who have not themselves suggested it on the record, or called the attention of their opponents to it, so as to enable them to point their evidence

to that mode of looking at it. S.C. Id. 217.

As to filing Affidavits.

3. The mere circumstance of a petition being ordered to stand over, on the application of a party, does not prevent that party from filing fresh affidavits. Ex parte *Worthington*, re *Oulton*, 3 Dea. 332.

PRINCIPAL AND AGENT.

M. and Co. abroad, through the agency of A. and Co., procure B. to consign them goods. M. and Co. remit to A. and Co. bills specifically appropriating them to pay B., and also write to B. to say they have done so. Before payment A. and Co. became bankrupt: Held, that as the original transaction was through the agency of A. and Co., they must be considered as agents throughout the transaction, and that there was sufficient privity to entitle B. to recover the bills from them, although M. and Co. were indebted to A. and Co. at the time. Ex parte *Hankey*, re *Douglas*, Mont. & Chit. 1.

PRINCIPAL AND BROKER.

Goods sent to broker for sale, he sells, according to sold note, ostensibly to A. B., but secretly, and according to bought note, to A. B. and self. A. B. insolvent. Broker bankrupt, and at time of bankruptcy goods remain in his possession: Held, contract void, and that owner might reclaim them specifically. Ex parte *Huth*, re *Pemberton*, Mont. & Chit. 667.

PRINCIPAL AND FACTOR.

A foreign merchant remits bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds:

PRINCIPAL AND FACTOR—
continued.

the factor sells the bills, but before the receipt of the purchase-money, becomes bankrupt, and dishonours the merchant's drafts for the amount: Held, that the merchant, and not the factor's assignees, were entitled to the proceeds of the bills, notwithstanding the bills had been indorsed both by the principal and the factor, and were sold by the factor in his own name. *Ex parte Pauli*, 3 Dea. 169.

PRINCIPAL AND SURETY.

1. When the creditor of the principal is sole assignee under a commission against the surety, and petitions for sale of the mortgaged property, a person must be appointed to protect the interests of the creditors of the surety. *Ex parte Haines, re Barnett*, Mont. & Chit. 32.

2. If a creditor receive dividends upon a debt partly secured by guarantee of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt, and the surety is relieved from liability by the amount of dividend on the part which is secured. *Raikes v. Todd*, 8 Adol. & Ell. 846. S. C. 1 Per. & D. 138.

PROCEDENDO.

1. Where the Court of Review supersedes a fiat, the Lord Chancellor cannot order a procedo without examining merits of order of the Court of Review, ergo, without an appeal. *In re Hall*, Mont. & Chit. 489.

2. The Court of Review having on the bankrupt's petition made an order to annul the fiat, instead of to reverse the adjudication merely, and the fiat having been annulled by the Lord Chancellor in pursuance thereof, according to the usual practice, the petitioning creditor applied for a special case; but owing, to the shape in which it was settled, declined to avail himself of it, and addressed an original petition to the Lord Chancellor, praying that his order annulling the fiat, might be discharged, because founded on an order of the Court of Review, which that Court had no jurisdiction to make, and praying for a writ of procedendo. The question of supersedeas turned on questions of fact: Held, that this was in substance an application to try the merits of the supersedeas; that the Lord Chancellor had no original jurisdiction to do so, the practice having been before the Court of Review; that they were bound by the special case as settled, which settlement was final, and the Lord Chancellor could not go into the question of its propriety, or exercise the discretion given him by section 3. to hear the case otherwise than by special case. *Ex parte Stubbs, re Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

PROOF GENERALLY.

1. Bankrupt's wife admitted to prove. *Ex parte Thring*, Mont. & Chit. 75.

2. A creditor having his debtor in execution, dies. A fiat issues against the debtor, who some time after obtains a judge's order for his discharge, which the executor of the creditor, though served with notice, does not oppose: Held, that the debt was not extinguished, but that

PROOF GENERALLY—
continued.

the executor might prove it against the bankrupt's estate. *Ex parte Goodman, re Nainby*, Mont. & Chit. 151.

3. What amounts to an application to prove, and a rejection thereof by the commissioner. *Ex parte Swinburne, re Field*, Mont. & Chit. 119.

4. Petition of three trustees, to prove against a bankrupt, fourth, contained charges of breach of trust, and prayed consequential directions: Held, Court could only make the common order to prove. Assignees served entitled to costs of resisting the entire application. *Ex parte Smith, re Clark*, Mont. & Chit. 347.

5. A., B., and C., carrying on business in partnership, in premises belonging to A., A. executes a mortgage of the property to a banking company, with a power of sale for securing 6000*l.*, the amount of advances to the partnership by the bank. A. afterwards dies, having devised the property to B. and C., who, becoming insolvents, make an assignment of all their estate and effects, in trust, for their creditors; and the trustees, with the sanction of the bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking company the 6000*l.*, by yearly instalments. A fiat afterwards issues against B. and C., under which the bank prove for the whole amount of their debt, including the 6000*l.* On a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be paid into Court subject to further order.

Ex parte Smyth, re Steel, 3 Dea. 597.

6. Where proof of debt has been tendered by affidavit, and commissioners are not satisfied, but require creditor to attend for examination, although she be very infirm and old, and unable to travel, all this Court can do is to give a commission in aid to take examination at creditor's own residence. *Ex parte Shaw, re Kirkby*, Mont. & Chit. 624.

7. A commissioner is not justified in rejecting the proof of a debt, which is admitted by the bankrupt, and not opposed by the assignees, because the deposition of the creditor is not supported by the evidence of third persons. *Ex parte Chapman*, 3 Dea. 273.

8. In a special case, it was stated that by contract between B. and G., G. had agreed to sell to B. all the oil which should arrive by a certain ship, which B. was to receive within fourteen days after the landing of the cargo, and pay for, at the expiration of that time, by bills or money, at a specified price per tun, with customary allowances: that the ship arrived, and the cargo was landed, and G. tendered the oil to B. at the end of the fourteen days: that the quantity of oil, after allowances, &c., was a certain number of tuns stated in the case: that, at the time of the tender, the market-price of oil was lower than the contract price by an amount stated: that B., on the tender being made, refused to accept; and that the difference of prices was within the knowledge of the parties: Held, that B., having become bankrupt after the refusal, G. could not prove for this breach of contract under the commission; for that, although G.'s claim would be measured by the difference between the contract and market prices at the time when B. should

PROOF GENERALLY—
continued.

have fulfilled his contract, yet the case did not show that the data on which the calculation must proceed, were so settled as to admit of no dispute, and render the intervention of a jury unnecessary, and consequently the claim of G. was not for a debt, but for damages. *Green* against *Bicknell*, 8 Adol. & Ell. 701. S. C. 3 Nev. & P. 634.

PROOF EXPUNGING.

1. Petition to expunge proof by a bankrupt, must show that the surplus or amount of his allowance will be affected. Leave to amend. *Ex parte*, and re *Pitchforth*, Mont. & Chit. 96.

2. A. and B. secretly partners, using the one his name as drawer, and the other his acceptor of bills, inquiry directed as to their general habit, and whether they intended thereby to bind the partnership estate. A creditor holding such bills, proved them first against the separate estate of A. under a separate fiat; then also against the joint estate of A. and B. Then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof is expunged accordingly: Held, that by receiving the dividend he had not made his election to abide by his separate proof, but on refunding the dividend he might elect to come in under the joint fiat. *Ex parte Law*, re *Bazley*, Mont. & Chit. 111.

3. A., B., and C., carrying on business in partnership, in premises belonging to A., A. executes a mortgage of the property to a banking company, with a power of sale for

securing 6000*l.*, the amount of advances to the partnership by the bank. A. afterwards dies, having devised the property to B. and C., who, becoming insolvent, make an assignment of all their estate and effects, in trust, for their creditors; and the trustees, with the sanction of the bank, enter into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking company the 6000*l.*, by yearly instalments. A fiat afterwards issues against B. and C., under which the bank prove for the whole amount of their debt, including the 6000*l.* On a petition by the assignees to expunge the proof for that sum, the Court allowed the proof to stand, but directed the dividends to be paid into Court, subject to further order. *Ex parte Smyth*, re *Steel*, 3 Dea. 597.

PROOF DOUBLE.

A. and B. secretly partners, using the one his name as drawer, and the other his acceptor of bills, inquiry directed as to their general habit, and whether they intended thereby to bind the partnership estate. A creditor holding such bills, proved them first against the separate estate of A., under a separate fiat; then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof is expunged accordingly: Held, that by receiving the dividend, he had not made his election to abide by his separate proof, but on refunding the dividend he might elect to come in under the joint fiat. *Ex parte Law*, re *Bazley*, Mont. & Chit. 111.

PROOF, FORM AND MODE OF.

1. Mode of proving against a bankrupt trustee and agent. Ex parte *Forrester*, re *Forrester*, Mont. & Chit. 143.

2. Mode of proof by bankrupt executor. Ex parte *Collingdon*, re *Anderson*, Mont. & Chit. 156.

3. Bankrupt trustee allowed to prove, but not to receive trust dividends. Ex parte *Strettell*, re *Raikes*, Mont. & Chit. 165.

4. A commissioner is not justified in rejecting the proof of a debt, which is admitted by the bankrupt, and not opposed by the assignees, because the deposition of the creditor is not supported by the evidence of third persons. Ex parte *Chapman*, 3 Dea. 273.

PROOF AGAINST JOINT OR SEPARATE ESTATE.

1. Semble, that the rule as to not proving so long as a solvent partner remains, does not apply in the case of joint contractors having no joint estate. A proof having been admitted while a solvent partner existed, the Court will not expunge the proof, if that partner has subsequently become insolvent, as it would be going through a mere form to expunge, when it could be readmitted by reason of the subsequent insolvency. A partner dying, having a solvent estate, is not a case within the rule, that a joint creditor cannot prove in competition with separate creditors, as long as there is a solvent partner liable. Ex parte *Banerman*, re *Lomax*, Mont. & Chit. 573. S. C. 3 Dea. 476.

2. Held, that the estate of a partner in a joint stock company, who has become bankrupt, and against whom judgment has not been obtained pursuant to 7 G. 4. c. 46.

ss. 9. 12. and 13. is liable to the claims of a creditor of the company, bankruptcy being a statutory execution. Whether 6 G. 4. c. 16. s. 62. applies where the partnership has ceased to exist? No difference between a banking company under 7 G. 4. c. 46. and an ordinary partnership, as regards the effect of 6 G. 4. c. 16. s. 62., and a creditor of the company may prove against the separate estate of an individual member for the purposes of the latter section.

Difference between co-contractors and co-partners. Ex parte *Marston*, and ex parte *Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

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Difference between co-contractors and co-partners. Ex parte *Marston*, and ex parte *Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

4. A joint stock bank, by their registered officer, held to have a right to prove against the joint estate of A., B., and C., although B. and C. were members in the bank, and there were creditors of the bank unpaid, who might also prove for the purposes of 6 G. 4. c. 16. s. 62. against

PROOF AGAINST JOINT OR SEPARATE ESTATE—*continued.*

the separate estates of B. and C. respectively. Proofs between partners are never governed by reasoning founded on probability of surplus; that is not dealt with till it arises. Per Sir G. Rose. *Ex parte Law*, re *Hayne*, Mont. & Chit. 590.

5. A., B., and C., partners in trade, together with D. as their surety, enter into a joint and several bond to their bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond, there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but at the time of the bankruptcy of A., B., and C., a much larger balance was due from them to the bankers than the sum secured by the bond. D., the surety, died; and in a creditor's suit brought by the bankers against his representatives, to which suit the assignees of A., B., and C. were also parties, it was found that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that should become due to them; but that the surety intended the bond to be a security only for the particular balance due to them at the date of the bond: Held, that the bond was, under these circumstances, proveable by the bankers against the separate estate of A. for the whole amount of the principal and interest secured by it. *Ex parte Walker*, re *Fidgeon*, 3 Dea. 672.

PUBLIC POLICY.

Defendant, subject to the approval of a meeting of creditors, agreed to pay plaintiff's assignees of B., a bankrupt, 2012*l.*, supposed to be equal to 10*s.* in the pound, upon all debts then proved; the fiat was to be worked in the usual way: a claim of defendants of 700*l.* was to be allowed in full; the assignees to pay the costs of the bankruptcy; the surplus of the estate to be divided among the creditors: but the dividends of those who had previously received 10*s.* in the pound were to be paid over to defendant, and the excess beyond 10*s.* in the pound to belong to the creditors: Held, that this agreement was void, as contrary to the policy of the bankrupt law. *Staines v. Wainwright*, 6 Bing. N. C. 174.

PROTECTION TO CREDITORS.

When the creditor of the principal is sole assignee under a commission against the surety, and petitions for sale of the mortgaged property, a person must be appointed to protect the interests of the creditors of the surety. *Ex parte Haines*, re *Barnett*, Mont. & Chit. 32.

PROTECTED PAYMENTS, DEALINGS, &c.

1. S. being sued by defendant, paid money into Court in lieu of bail on the 13th of September, having omitted to put in bail, or pay the additional sum required as security for costs, the Court ordered the money to be paid to defendant, on the 23d of September; on the 9th S. had committed an act of bankruptcy, and on the 28th a fiat was issued against him: Held, that his assignees could not recover from defendant the money

PROTECTED PAYMENTS,
DEALINGS, &c.—*continued.*

so paid him by order of the Court. *Reynolds v. Wedd*, 4 Bing. N. C. 694.

2. A bankrupt having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money: Held, that the transaction, though bonâ fide, and without notice of an act of bankruptcy, was not protected by sect. 82. of 6 Geo. 4. c. 16.; but that his assignees might recover the value in trover. *Wright v. Fearnley*, 5 Bing. N. C. 89. S. C. 6 Scott, 813.

3. A. committed an act of bankruptcy on the 9th September, and on the 13th he was arrested on process issued in an action commenced in the Boston court of requests to recover 420*l.*, on a contract entered into on the 5th, and pursuant to which goods were delivered on the 7th of the same month. He deposited the amount indorsed on the writ in the hands of the sheriff, and it was paid into Court, but without the additional 10*l.* for costs (under the statutes 43 Geo. 3. c. 46. s. 2. and 7 & 8 Geo. 4. c. 71. s. 2.); and on the 23d the plaintiff in the action obtained an order for the payment of the money out of Court to him, and was then informed of the act of bankruptcy. A fiat was issued on the 28th, and assignees were appointed: and in an action by them to recover back the 420*l.*, as money had and received to their use: Held, that the payment out of Court was by compulsion of law, and that they were not entitled to recover. *Reynolds v. Wedd*, 6 Dowl. Prac. Co. 728.

4. An act of bankruptcy having been committed on the 6th of July, a bonâ fide execution was issued on the 8th, under which the goods of the bankrupt were levied. On the

19th of July the 2 & 3 Vict. c. 29. was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees: Held, that the execution was protected by the statute. *Edmonds v. Lawley*, 6 Mees. & Wels. 285.

REFERENCE.

1. Where on petition to appoint trustee in place of bankrupt, usual reference is dispensed with, affidavit must be made of his fitness and respectability. Ex parte *Palmer*, re *Peach*, Mont. & Chit. 364.

2. Petition to supersede charged that petitioning creditor's debt was composed of bill of costs of attorney in action. Petitioner contended that, through negligence, cause was lost, and business useless, and that attorney agreed to take costs out of pocket only (see ante, page 346.). Reference by consent to Registrar to tax costs, having regard to question of negligence, and to ascertain what due, and state special circumstances: Held, he ought to have considered the contract, and to have taxed accordingly; and that the order of reference so taken by consent was no waiver of the objection founded on the contract. Ex parte and re *Southall*, Mont. & Chit. 656.

REFUNDING.

C., a trader, on the 5th of June, 1838, assigned his effects in trust for the benefit of his creditors; on the same day (but before the execution of the assignment) a fi. fa. against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on the 6th. The trustees under the assignment paid him the amount of the levy under protest,

REFUNDING—*continued.*

and he withdrew from possession. It afterwards appeared that C. had committed an act of bankruptcy on the 2d of June, upon which a fiat issued on the 18th: Held, that the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fact. *Harris v. Lloyd*, 5 Mees. & Wels. 432.

REHEARING.

Semble, the 1 & 2 W. 4. c. 56. s. 32., limiting the time of appeal to the Lord Chancellor, does not prevent the Court of Review rehearing a question of proof decided by them although nine months had since elapsed. *Ex parte Whitmore*, 3 Mont. & Ayr. 627., confirmed on a rehearing, further evidence being admitted. *Ex parte Jackson*, re *Warwick*, Mont. & Chit. 263.

RELEASE.

Creditors having brought a joint action against the bankrupt and A. and B., and having procured bankrupt to plead bankruptcy, undertaking to release and discharge him, and having entered a nolle prosequi as to him, and obtained judgment by default against A., and verdict and judgment against B. Quære, Whether the right against bankrupt's estate is not merged and gone in toto? *Ex parte Banerman*, re *Lomax*, Mont. & Chit. 569. S. C. 3 Dea. 476.

REPUTED OWNERSHIP.

1. M. and Co. abroad, through the agency of A. and Co., procure B. to consign them goods. M. and

Co. remit to A. and Co. bills specifically appropriating them to pay B., and also write to B. to say they have done so. Before payment A. and Co. became bankrupt: Held, that as the original transaction was through the agency of A. and Co., they must be considered as agents throughout the transaction; and that there was sufficient privity to entitle B. to recover the bills from them, although M. & Co. were indebted to A. and Co. at the time. *Ex parte Hankey*, re *Douglas*, Mont. & Chit. 1.

2. A casual conversation is sufficient notice to prevent reputed ownership. The Court will restrain assignees from proceeding at law to invalidate transfer of shares by virtue of reputed ownership. *Ex parte and re Richardson*, Mont. & Chit. 43.

3. A pawnbroker who, in taking pledges, omits to pursue the course required by 39 & 40 Geo. 3. c. 99. s. 6. acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a pawner who afterwards becomes bankrupt. *Fergusson v. Norman*, 5 Bing. N. C. 76. S. C. 6 Scott, 794.

4. Under a plea that the plaintiff was not possessed as of his own property as assignee of the chattels in question, it appeared that the plaintiff claimed as assignee under a second commission, under which the bankrupt had obtained his certificate; but his estate had not produced sufficient to pay 15s. in the pound: Held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to shew, in answer to the plaintiff's claim, that the goods (after acquired property) had been suffered to remain in the order and disposition of the bankrupt by the consent and permission of the true owner, and therefore passed under the 7 Geo. 4. c. 57. s. 30.

REPUTED OWNERSHIP— *continued.*

to the assignees of the Insolvent Debtors' Court, the bankrupt having taken the benefit of that act. *Butler v. Hobson*, 5 Scott, 798. S. C. 5 Bing. N. C. 128.

5. A fiat issued against a trader who had already been twice bankrupt, and obtained his certificate on both occasions, but whose estate had not produced sufficient to pay the creditors under the second commission 15s. in the pound. The bankrupt had, between the time of obtaining his certificate under the second commission and the issuing of the fiat, carried on business to a considerable extent, and was possessed of property which might at any time have been made available in satisfaction of the debts proved under the second commission: and the assignees under that commission was aware of these facts: Held, that, under the circumstances, the fiat was not void, such after-acquired property having been suffered to remain in the possession of the bankrupt as reputed owner, and therefore being such, as by virtue of the 6 Geo. 4. c. 16. s. 72., the fiat might operate upon. *Butler v. Hobson*, 5 Scott, 824. S. C. 5 Bing. N. C. 128.

REVERSING ADJUDICATION.

See FIAT SUPERSEDING.

REVOCATION OF SUBMISSION TO ARBITRATION.

An action having been brought to recover damages for a breach of an agreement, by which the defendant covenanted to purchase an estate of the plaintiff, for which he was

to pay a large sum by instalments, and secure the remainder by an annuity chargeable upon certain property of sufficient value, a verdict was taken at Nisi Prius for 10,000*l.*, subject to a reference of the cause, and all matters in difference; 3500*l.* to be paid by the defendant into the hands of the arbitrator, to be paid as the latter thought fit, and the arbitrator to order what should be done in the action. The arbitrator awarded, that the plaintiff was entitled to have a verdict entered for him, on the several issues in the cause, and that he had sustained damage, by reason of the premises in the pleadings mentioned, and the matters in difference, to the amount of 6067*l.*; and he then awarded that the 3500*l.* should be paid to the plaintiff, together with a further sum of 2567*l.*, the balance of such damages, on all the causes of action: Held, that the award, although it did not distinguish the amount awarded, in respect of the action, from that upon the matters in difference, and although it awarded a gross sum, including the value of the annuity, was good: Held, also, that the bankruptcy of the defendant, before the making of the award, was not a ground for setting aside the award. *Semble*, that the bankruptcy did not operate as a revocation of the submission to reference. *Taylor v. Shuttleworth*, 8 Dowl. Pr. Ca. 281.

SALE.

1. When the creditor of the principal is sole assignee, under a commission against the surety, and petitions for sale of the mortgaged property, a person must be appointed to protect the interests of the creditors of the surety. *Ex parte Haines, re Barnett*, Mont. & Chit. 32.

SALE—continued.

2. If a petition for the sale of an equitable mortgage is rendered necessary, from a mistaken view by the assignees of their rights, they can claim costs only out of the bankrupt's general estate. *Ex parte Bate, re Gough*, Mont. & Chit. 58.

3. On application, by equitable mortgagee, for leave to bid, Court will not make order to spare her from paying deposit, if declared the purchaser. *Ex parte Wilson, re Maltby*, Mont. & Chit. 110.

4. The bankrupt, and his surety, entered into an agreement with the assignees to pay all the creditors 20s. in the pound, in consideration of which they agreed that the fiat should be annulled. In pursuance of this agreement, 10s. in the pound was paid, and the assignees had a fund sufficient to pay the remainder, but were, nevertheless, proceeding to sell certain property of the bankrupt. On a petition, by the bankrupt, to restrain them from so doing, the Court declined to make any order, as the requisitions of the composition contract clause had not been complied with. *Ex parte and re Nainby*, 3 Dea. 587.

5. Special order made as to the disposal of the bankrupt's goods, which one assignee had taken in execution, and which the other assignee claimed as having been left in the reputed ownership of the bankrupt. *Ex parte Bishop*, 3 Dea. 132.

SCOTLAND.

According to English law, an equitable mortgage of Scotch property was effected. The special case found that, "by the law of Scotland, no lien or equitable mortgage on the estate in question was created

by the deposit." Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors, being resident here, the property came to the hands of the assignees charged with the equity, and, therefore, they were bound to pay the mortgage debt out of the proceeds of the particular property. *Ex parte Pollard re Courtney*, Mont. & Chit. 239.

SECURITY FOR COSTS.

1. The plaintiff had been three times insolvent, and once a bankrupt, and brought an action on a bill of exchange, as trustee for a third person, to whom he had transferred the bill; the Court refused to order, on those grounds, that the plaintiff should give security for costs. *Wray v. Brown*, 8 Dowl. Pr. Ca. 279. S. C. 6 Bing. N. C. 271.

2. After verdict in favour of the plaintiff, and a rule for a new trial made absolute, he became bankrupt, and the Court compelled him to give security for costs, although there was no affidavit that the action was carried on for the benefit of the assignees. *Denton v. Williams*, 8 Dowl. Pr. C. 123.

3. The Court refused to compel the lessor of the plaintiff, in an action of ejectment, to give security for costs, on the ground that he was an uncertificated bankrupt, it appearing that the assignees had declined to proceed with the action, and it being sworn that it was carried on solely for the bankrupt's benefit. *Doe d. Colnaghi v. Blick*, 5 Scott. 714.

SERVANTS, &c.

An articulated clerk to an attorney and solicitor is not an apprentice

SERVANTS, &c.—*continued.*

within the meaning of the 49th section of the bankrupt act, 6 G. 4. c. 16. *Ex parte Prideaux*, in re *Bush and Prideaux*, 3 Myl. & Cr. 327.

SERVICE.

See PETITION, SERVICE OF. AFFIDAVIT OF SERVICE, &c.

SET-OFF.

1. *Quære*, whether, under the 7 G. 4. c. 46., and 1 & 2 Vict. c. 96., a joint stock bank can sue out a fiat against a shareholder, upon a debt due in respect of an unsettled account, precluding the debtor's right of set-off? Held, that the two acts must be taken together, and that, therefore, the company might issue such fiat by their registered officer. *Quære*, whether, under the 7 G. 4. c. 46., a company could sue a member of it, at law, in respect of an unsettled partnership debt, precluding set-off? *Semble*, not. Per Sir G. Rose. *Quære*, whether the 7 G. 4., and 1 & 2 Vict., taken together, do not convert an equitable debt, due from one member of a company to the body, into a legal debt for all purposes, by taking away the right of set-off? *Quære*, whether the 7 G. 4. and 1 & 2 Vict., excluding the right of a partner in a company to set-off, was intended to apply to cases only of bills of exchange due by the partner, on pure banking accounts, and not to transactions involving the account of capital? *Semble*, not. *Ex parte and re Hall, Mont. & Chit.* 365.

2. Upon a dissolution of partnership, defendant agreed to pay his

co-partners 6817*l.* 9*s.* 8*d.*, as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.*, due from the firm to H. After the dissolution they became bankrupts, and never paid H.: Held, that, in an action by their assignees for the 6817*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay the 51,891*l.* 12*s.* to H. *Abbott v. Hicks*, 5 Bing. N. C. 578. S. C. 7 Scott, 715.

3. To an action by assignees of a bankrupt, for the price of a phaeton, for which defendant had agreed to pay ready money, defendant pleaded a set-off in respect of a bill of exchange, drawn by H., accepted by the bankrupt, and indorsed by H. to defendant. Plaintiffs replied that, after the bill was dishonoured, H. indorsed it to defendant, without consideration, in trust that defendant should purchase the phaeton of the bankrupt, hand it over to H., and fraudulently attempt to set off the bill against the price of the phaeton: Held, a sufficient answer to the claim of set-off. *Lackington v. Combes*, 6 Bing. N. C. 71.

4. Declaration, by assignees of B., a bankrupt, stated that defendant, in consideration that B. would sell and deliver to him sugars, at the rate and price of, &c., agreed to pay him for the same, prompt two months, or an acceptance at twenty days, if required; that the goods were delivered to and received by defendant, before the bankruptcy, on the terms aforesaid; but he did not, though required before the bankruptcy, pay, then or since, by an acceptance, nor did he otherwise pay, whereby B., before his bankruptcy, lost the use and benefit of such acceptance, and the benefit which would have accrued to him from having it dis-

SET-OFF—*continued.*

counted, and raising money on it for his use in the way of his trade, and was put to loss and inconvenience by not having such acceptance to negotiate, and his estate applicable to the payment of his just debts was, by reason of the non-payment for the goods in manner, afterwards diminished in value, to the damage of the assignees and creditors. Plea, set-off for a debt due from B. before bankruptcy. Demurrer: Held, that the concluding averments of the declaration did not show a special damage to the plaintiffs, but only a common pecuniary loss; that the case appearing on the declaration was one of mutual credit, within stat. 6 G. 4. c. 16. s. 50., and that a set-off might be pleaded. *Groom v. West*, 8 Adol. & Ell. 701. S. C. 1 Parry & D. 19.

5. To a count for money had and received, to the use of assignees of a bankrupt, the defendant pleaded that, although the money mentioned remained and was in the possession of the defendant, after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession; that before and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum; and that, at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy: Held, that this was not a good ground for a set-off (which the plea concluded with), and that it was therefore bad. *Wood v. Smith*, 4 Mees. & Wels. 522.

SHERIFF.

Semble, notice by the solicitor to the petitioning creditor, that a fiat Vol. I.

has been issued against a party whose goods, or the proceeds of them, are in the hands of the sheriff, under an execution, is not a sufficient claim of the goods to warrant an application for a rule to interplead. *Tarleton v. Dumelow*, 5 Bing. N. C. 110.

SOLICITOR TO FIAT.

The affidavit (dated 22d April, 1839), under the abolition of arrest act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.* and upwards," on bills of exchange, as due to A., the "deponent, and B. and C., his late partners." The notice and requisition to pay (dated the 24th April), was in respect of a debt of 3612*l.*, but intended as the same and the real debt, and was signed by A. for B. and C. and himself, on the 24th April. A. filed another affidavit, swearing the debt to be 3612*l.* "upon bills of exchange," and on the 2d May, A. and B., for themselves and C., gave a corresponding notice. The commissioners approved a bond for 200*l.*, as security under the first affidavit, although he had notice that the real debt was the 3612*l.* On the 3d June, A., B. and C. issued a fiat on the alleged act of bankruptcy, by not having given security under the second affidavit, and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the 8th section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat; and the petitioning creditor's affidavit, on striking the docket, stated the debt to be due "for goods sold and delivered:" Held, there were not sufficient objections to warrant the staying the advertisement in the Gazette; and, upon the question of supersedeas,

SOLICITOR TO FIAT—continued.

quære, whether these, or any of them, are sufficient grounds for superseding. Per Sir G. Rose. The proof of the act of bankruptcy by the solicitor to the fiat, is sufficiently bad to induce the Court to send the question to be tried by action at law. *Ex parte and re Rhodes*, Mont. & Chit. 319.

SOLICITOR AND CLIENT.

1. A fiat founded on a bill due to a solicitor, before taxation, is good *primâ facie*, if afterwards, on taxation, it is reduced below 100*l*. Semble, the fiat will be superseded. *Ex parte and re Ford*, Mont. & Chit. 97.

2. Upon a question of quantum of a petitioning creditor's debt, consisting of a bill of costs, the Court has no power to inquire into the conduct of the solicitor in the proceedings out of which it arose, though alleged he had been guilty of gross neglect and misconduct. *Ex parte and re Southall*, Mont. & Chit. 346.

3. Quære, as to the lien of a solicitor upon a superseded fiat. *Ex parte and re May*, Mont. & Chit. 619.

4. The Court has power, independently of the 2 G. 3. c. 23. s. 23., to order an attorney to deliver a signed bill of costs, and if the client becomes bankrupt, his right, in that respect, vests in his assignees. *Clarkson v. Parker*, 6 Dowl. Prac. Ca. 87.

SOLVENT PARTNER.

Semble, that the rule as to not proving, so long as a solvent partner remains, does not apply in the case of joint contractors having no joint estate. A proof having been

admitted while a solvent partner existed, the Court will not expunge the proof, if that partner has subsequently become insolvent, as it would be going through a mere form to expunge, when it could be re-admitted by reason of the subsequent insolvency. A partner dying, leaving a solvent estate, is not a case within the rule, that a joint creditor cannot prove in competition with separate creditors, so long as there is a solvent partner liable. *Ex parte Banerman, re Lomax*, Mont. & Chit. 573. S. C. 3 Dea. 476.

SPECIAL CASE.

1. Where a special case raises on the face of it any doubt as to facts within the knowledge of officers of the Court, the Lord Chancellor will direct further inquiry; *secus*, if unambiguous. *Ex parte and re Rome*, Mont. & Chit. 334.

2. Quære, Whether there is any mode of appealing from the shape in which a special case is settled by the Court of Review? In *re Hall*, Mont. & Chit. 489.

3. The Court of Review having, on the bankrupt's petition, made an order to annul the fiat, instead of to reverse the adjudication merely, and the fiat having been annulled by the Lord Chancellor in pursuance thereof, according to the usual practice, the petitioning creditor applied for a special case; but owing to the shape in which it was settled, declined to avail himself of it, and addressed an original petition to the Lord Chancellor, praying that his order annulling the fiat might be discharged, because founded on an order of the Court of Review, which that Court had no jurisdiction to make, and praying for a writ of *supercedenda*. The question of *super-*

SPECIAL CASE—*continued.*

sedeas turned on questions of fact: Held, that this was in substance an application to try the merits of the supersedeas; that the Lord Chancellor had no original jurisdiction to do so, the practice having been before the Court of Review; that they were bound by the special case as settled, which settlement was final; and the Lord Chancellor could not go into the question of its propriety, or exercise the discretion given him by section 3. to hear the case, otherwise than by special case. *Ex parte Stubbs, re Hall*, Mont. & Chit. 511. S. C. 3 Dea. 549.

4. The counsel for the appellant, in applying for a special case, is bound to state to the Judge, who certifies it, the grounds of appeal; and the case itself should state the facts found by the Court, and not the evidence at length, by which the facts were proved. *Ex parte Wilson*, 3 Dea. 214.

SPECIFIC APPROPRIATION.

1. M. and Co. abroad, through the agency of A. and Co., procure B. to consign them goods. M. and Co. remit to A. and Co. bills, specifically appropriating them to pay B., and also write to B. to say they have done so. Before payment A. and Co. became bankrupt: Held, that as the original transaction was through the agency of A. and Co., they must be considered as agents throughout the transaction, and that there was sufficient privity to entitle B. to recover the bills from them, although M. and Co. were indebted to A. and Co. at the time. *Ex parte Hankey*, in re *Douglas*, Mont. & Chit. 1.

2. D. being captain of a ship bound to the East Indies, and proprietor of

the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th of October, while the ship was on her voyage home, D. being indebted to the owner, gave him a written order as follows:—"I hereby authorise you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th of December, and a fiat in bankruptcy was issued against D. on the 18th. On an act of bankruptcy committed on the 2d: Held, that D.'s assignees could not recover against the owner in trover for the cabin furniture. *Belcher v. Oldfield*, 6 Bing. N. C. 102.

3. B., a manufacturer, had been accustomed to consign goods by the agency of O. and Co., commission merchants, to houses in America, for sale on H.'s account. O. and Co. made advances to H. on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their commission, advances, and other charges. In 1831, H. being indebted to O. and Co. for such advances and charges, and likewise owing 3000*l.* to his own bankers, wrote to O. and Co. authorising them, after paying themselves their balance out of the net proceeds of H.'s shipments down to that date, to pay B. and Co., the bankers, half the remainder of such proceeds, so that the payment should not exceed 3000*l.* O. and Co. thereupon wrote to B. and Co., stating that they, agreeably to H.'s authority, engaged to pay B. & Co. (after liquidating their own balance) a proportion of the remaining proceeds, &c. (as in H.'s letter), in consider-

SPECIFIC APPROPRIATION—
continued.

ation of B. and Co. guaranteeing O. and Co. from claims by any other party in consequence of such payment. B. and Co. then wrote to O. and Co. that, understanding from H. that O. and Co. had agreed to pay any surplus balance, &c. (as in H.'s letter), they, B. and Co., agreed to guarantee O. and Co. against such other claims. A few days before this correspondence, H. [had transmitted to O. and Co. a letter of authority resembling that afterwards sent, and had seen a draft of a letter from them to B. and Co., like that afterwards sent by O. and Co. to B. and Co., claiming a guarantee as above; but this first authority was revoked and never acted upon. In 1833 H. became bankrupt. The assignees gave O. and Co. notice not to make any payments out of H.'s effects, except to them. Afterwards O. and Co. received proceeds of sales from the houses abroad, and paid them over to B. and Co. according to the authority given by H. The assignees sued O. and Co. for the amount as money had and received to their use: Held, that the transaction between H., O. and Co., and B. and Co., was either a valid appropriation, or equitable assignment of funds to the amount of 3000*l.*, in favour of B. and Co., and was not revoked by H.'s bankruptcy. *Hutchinson* against *Heyworth*, 9 Adol. & Ell. 375. S. C. 1 Per. & D. 266.

SPEEDING CAUSE.

Where a sole plaintiff becomes bankrupt, and the defendant wishes to speed the cause, although he can obtain no direct order against the

assignees to continue the suit, he may move that, unless they file a supplemental bill within a given time, the suit shall be dismissed. *Holt v. Hardcastle*, 3 You. & Coll. 230.

STATE OF FACTS.

State of facts before the registrar cannot be amended. Registrar's report must be made. In re *Turner*, Mont. & Chit. 73.

STATUTE OF LIMITATIONS.

Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer, and then dissolve the partnership; upon which occasion the two continuing partners give the executors a bond to secure the balance due to them; and more than six years afterwards the two become bankrupt: Held, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. Ex parte *Hall*, 3 Dea. 125.

STATUTES.

2 & 3 Vic. c. 29. For better protection of parties dealing with persons liable to bankrupt laws, Appendix i.

2 & 3 Vic. c. 37. Usury, Appendix ii.

2 & 3 Vic. c. 60. To explain, &c. 1 W. 4. for consolidating, &c., laws for facilitating payment of debts out of real estate, Appendix iv.

STATUTE, COPY OF.

1. If money is entrusted to the treasurer of a friendly society for

STATUTE, COPY OF—*continued.*

which he is to pay interest, and another sum for which he is not to pay interest, and he enter into the statutable bond as treasurer for the whole sum, the society, upon the bankruptcy of the treasurer, is entitled to full payment within the 4 & 5 W. 4. c. 40. s. 12., and no part is to be treated as a loan to him in his private character. *Ex parte Ray, re Woodliffe, Mont. & Chit. 50.*

2. A clerk who had involuntarily quitted the bankrupt's service nine months previous to the fiat, through the approaching insolvency of the bankrupt and his decreasing business, the trade going on in the mean time, and he obtaining employment elsewhere: Held, not entitled to six months' wages in full, especially where he had allowed the first and final dividend to be declared before making his claim. *Dubit. Sir G. Rose. Ex parte Gee, re Sawyer, Mont. & Chit. 99.*

3. *Quære*, whether one partner can avail himself of the statute 1 & 2 Vict. c. 96. against his copartner, without there having been a balance struck, and a debt ascertained to be due from the latter. *Ex parte and re Brown, Mont. & Chit. 199.*

4. *Semble*, the 1 & 2 W. 4. c. 56. s. 32. limiting the time of appeal to the Lord Chancellor, does not prevent the Court of Review rehearing a question of proof decided by them, although nine months had since elapsed. *Ex parte Whitmore, 3 Mont. & Ayr, 627.* confirmed on a rehearing, further evidence being admitted. *Ex parte Jackson, re Warwick, Mont. & Chit. 263.*

5. More than five per cent., taken on a renewed bill, the original loan being on bills renewable at the option of the lender, although there

was a contract "not to renew for more than eighteen months;" it is a transaction protected by 3 & 4 W. 4. c. 98. s. 7., order of the Court of Review reversed. *Ex parte Terrewest, re Poynter, Mont. & Chit. 351.*

6. *Quære*, whether under the 7 G. 4. c. 46., and 1 & 2 Vict. c. 96. a joint stock bank can sue out a fiat against a shareholder, upon a debt due in respect of an unsettled account, precluding the debtor's right of set-off: Held, that the two acts must be taken together, and that therefore the company might issue such fiat by their registered officer.

Quære, whether under the 7 G. 4. c. 46., a company could sue a member of it at law, in respect of an unsettled partnership debt, precluding set-off? *Semble*, not.

Per Sir G. Rose? *Quære*, whether the 7 G. 4. and 1 & 2 Vict. taken together, do not convert an equitable debt due from one member of a company to the body into a legal debt for all purposes, by taking away the right of set-off?

Quære, whether the 7 G. 4. and 1 & 2 Vict. excluding the right of a partner in a company to set off, was intended to apply to cases only of bills of exchange due by the partner on pure banking accounts, and not to transactions involving the account of capital? *Semble*, not. *Ex parte and re Hall, Mont. & Chit. 365.*

7. See the affidavit of debt under the 1 & 2 Vict. c. 110. s. 8., *antè*, 375.: Held, that it shewed sufficiently that the registered officer was duly appointed and authorised to make it, and that the company was established, and were carrying on business according to the provisions of the 7 G. 4. c. 46. *Dissent. Sir J. Cross, Id. ib.*

8. Held, that the estate of a partner in a joint stock company who has

STATUTE, COPY OF—*continued.*

become bankrupt, and against whom judgment has not been obtained pursuant to 7 G. 4. c. 46. ss. 9. 12. & 13. is liable to the claims of a creditor of the company; bankruptcy being a statutory execution.

No difference between a banking company under 7 G. 4. c. 46. and an ordinary partnership, as regards the effect of 6 G. 4. c. 16. s. 62.; and a creditor of the company may prove against the separate estate of an individual member, for the purposes of the latter section.

A banking company under 7 G. 4. c. 16., though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 G. 4. c. 16. s. 62. *Ex parte Marston* and *Ex parte Broome*, re *Marston*, Mont. & Chit. 576. S. C. 3 Dea. 476.

9. Whether 6 G. 4. c. 16. s. 62. applies where the partnership has ceased to exist? No difference between a banking company under 7 G. 4. c. 46., and an ordinary partnership as regards the effect of 6 G. 4. c. 16. s. 62.; and a creditor of the company may prove against the separate estate of an individual member for the purposes of the latter section. A banking company under 7 G. 4. c. 46., though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 G. 4. c. 16. s. 62. *Id. ib.*

10. A joint stock bank, by their registered officer, held to have a right to prove against the joint estate of A., B., and C., although B. and C. were members in the bank and there were creditors of the bank unpaid, who might also prove for the purposes of 6 G. 4. c. 16. s. 62. against the separate estates of B. and C. respectively. Proofs between partners are never governed by reasoning founded

on probability of surplus; that is not dealt with till it arises. Per Sir G. Rose. *Ex parte Lane*, re *Hague*, Mont. & Chit. 590.

11. In computing the "two calendar months" under the 1 & 2 Vict. c. 110. s. 8., the day on which the affidavit of debt was filed must be included. Therefore, where affidavit was filed on the 27th April, and the fiat (though earlier in the day) issued on the 27th June: Held, too late, and fiat annulled. *Ex parte Whitby*, re *Whitby*, Mont. & Chit. 671.

12. On the 6th July, an execution was levied on the goods of A. on the 19th of the same month, the 2 & 3 Vict. c. 29. came into operation, and a few days afterwards a fiat of bankruptcy issued against A. upon an act of bankruptcy committed before the levy: Held, that the act rendered the execution valid, and that the assignees were not entitled to the property. *Edwards v. Lawley*, 8 Dowl. Pr. Ca. 234. S. C. 6 Mees. & Wels. 285.

13. A defendant may apply to set aside a warrant of attorney, and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110. s. 9., although he have become bankrupt since the execution of it. *Taylor v. Nicholls*, 6 Mees. & Wels. 91.

14. Declaration, by assignees of B. a bankrupt, stated that defendant, in consideration that B. would sell and deliver to him sugars, at the rate and price of, &c., agreed to pay him for the same, prompt two months or an acceptance at seventy days if required; that the goods were delivered to, and received by defendant before the bankruptcy on the terms aforesaid, but he did not, though required before the bankruptcy, pay then or since, by an acceptance, nor did he otherwise pay; whereby B.

STATUTE, COPY OF—*continued.*

before his bankruptcy lost the use and benefit of such acceptance, and the benefit which would have accrued to him from having it discounted, and raising money on it for his use in the way of his trade, and was put to loss and inconvenience by not having such acceptance to negotiate; and his estate applicable to the payment of his just debts was, by reason of the nonpayment for the goods, in manner afterwards diminished in value, to the damage of the assignees and creditors. Plea, set off for a debt due from B. before bankruptcy. Demurrer: Held, that the concluding averments of the declaration did not shew a special damage to the plaintiffs, but only a common pecuniary loss: that the case appearing on the declaration was one of mutual credit, within stat. 6 G. 4. c. 16. s. 50., and that a set-off might be pleaded. *Groome v. West*, 8 Adol. & Ell. 758. S. C. 1 Perry & D. 19.

15. A lessee, under an unwritten contract reserving rent on 6th April and 6th October, became bankrupt, and a fiat issued in March, the rent due in the previous October having been paid. Upon the assignees refusing to accept the premises, the bankrupt offered, within fourteen days after his receiving notice of such refusal, and one day before 6th April, to deliver up possession to the lessor. Held, that under stat. 6 G. 4. c. 16. s. 75. he was not liable in assumpsit for use and occupation to pay anything in respect of the time subsequent to 6th October. Where the bankrupt holds by an unwritten lease, offering possession is a delivery within sect. 75. *Slack v. Sharpe*, 8 Adol. & Ell. 366.

16. To an action for money had and received, it is a good plea (under

stat. 6 G. 4. c. 16. s. 127.) that plaintiff became bankrupt and obtained his certificate in 1822; that a second commission issued against him May 20, 1825, under which his effects were assigned in July 1825, and he obtained his certificate in 1826, but did not pay 15s. in the pound, whereby, and by force of the statute, the debt demanded in the declaration hath vested in the assignees. Stat. 6 G. 4. c. 16. s. 127. (September 1. 1835) operates in such a case retrospectively. Where the estate of a bankrupt after certificate is vested in the assignees, by stat. 6 G. 4. c. 16. s. 127. he cannot sue for an after accruing debt, though the assignees do not interpose. *Young v. Rishworth*, 8 Adol. & Ell. 470. S. C. 3 Nev. & Per. 585.

17. An articled clerk to an attorney and solicitor is not an apprentice within the meaning of the forty-ninth section of the Bankrupt Act, 6 G. 4. c. 16. *Ex parte Prideaux*, In re *Bush and Prideaux*, 3 Myl. & Cr. 327.

STAYING ADVERTISEMENT.

Petition that bankrupt might be at liberty to attend adjudication by counsel refused; but petition retained, with stay of advertisement, if bankruptcy adjudged, and petitioner to apply instant for superseas. *Ex parte and re Foulkes*, Mont. & Chit. 68.

STAYING CERTIFICATE.

See CERTIFICATE — PETITION TO STAY CERTIFICATE.

STAY PROCEEDINGS.

Where a defendant has become bankrupt after action commenced,
3 D 4

STAYING PROCEEDINGS—
continued.

the Court will not stay proceedings, on the ground that the plaintiff has proved his debt under the fiat, but application should be made to the Court of Review, or the Great Seal. *Ransford v. Barry*, 7 Dowl. Pr. Ca. 807.

SUBSTITUTION OF PETITION-
ING CREDITORS' DEBT.

See PETITIONING CREDITORS' DEBT,
SUBSTITUTION OF.

SUBSTITUTION OF DEBTORS.

1. Upon the formation of a new firm, the separate debt of one of the firm does not, without express agreement, become the joint debt of the new firm. Ex parte *Hitchcock*, re *Worth*, Mont. & Chit. 60.

2. A., a creditor of B. and C., gives D. a general power of attorney for the management of his affairs, dated 4th July, 1834, under which D. consents to an arrangement between B. and C. on the dissolution of their partnership, that C. should become solely responsible for A.'s debt. That being still unpaid, C. becomes bankrupt, B. remaining solvent; and D. proves the debt against the separate estate of C. After the fiat, A. is found to have been lunatic since 1st July, 1834. On petition to expunge, on the ground that D.'s adoption of C. as sole debtor was under a void power, and without authority, and that B. remained solvent, and therefore liable: Held, that the proof was properly made, lunacy is not, per se, a revocation of power of attorney. Ex parte *Bradbury*, re *Walden*, Mont. & Chit. 625.

3. H. deposits with W., his agent, Virginia bonds for 50,000 dollars, which W., in July, 1836, pledged with a third person, as a security for his own debt. In September, 1836, H. applies to W. to grant him a credit for 10,000*l.* on the security of the Virginian bonds, which W. agrees to do, but says nothing about having previously pledged them for his own purposes. On the 1st October, 1836, H. draws bills on W. to the amount of 10,000*l.*, which are accepted by W. and C., W. having taken C. into partnership on the very day the bills were drawn, and the bills are duly paid by W. and C. at maturity, H. (at the request of W. and C.) remitting 7,000*l.* towards the payment of them. Subsequent dealings take place between H. and W. and C. until the latter stop payment, when they make a balance to be due to them from H., but take no notice of the Virginian bonds, the chief part of which had been already redeemed by W. and C., and pledged again with another person for a partnership debt from W. and C.: Held, that the subsequent dealings of H. with the partnership of W. and C. did not deprive him of his right to prove the amount of the bonds against the separate estate of W. Ex parte *Meinertzhagen*, 3 Dea. 101.

SUPERSEDING.

See PETITION TO SUPERSEDE —
FIAT SUPERSEDING.

SUPPLEMENTAL PETITION.

See PETITION, SUPPLEMENTAL.

SURETY.

See also **PRINCIPAL AND SURETY.**

1. Proof made, and then part payment of debt by surety: Held, creditor entitled to receive dividends on entire proof. *Ex parte Coplestone, re Snell*, Mont. & Chit. 262.

2. A. B. gave his acceptance to the bankrupt, who deposited it with his bankers, to secure his floating balance. The bankers proved a debt to a much larger amount, and received a dividend of only 2s. in the pound. A. B. subsequently paid his acceptance: — Held, per C. R., A. B. had no right to call on the bankers to refund the amount of the 2s. dividend, but had a right to future dividends: but reversed by the Lord Chancellor on appeal, and bankers ordered to refund. *Ex parte Holmes, re Garner*, Mont. & Chit. 301.

3. A., B., and C., partners in trade, together with D. as their surety, enter into a joint and several bond to their bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of 10,000*l.* on demand, with interest from its date. At the date of the bond there was a balance of 2375*l.* due to the bankers, which was discharged by subsequent payments; but at the time of the bankruptcy of A., B., and C., a much larger balance was due from them to the bankers than the sum secured by the bond. D., the surety, died; and in a creditor's suit brought by the bankers against his representatives, to which suit the assignees of A., B., and C. were also parties, it was found that the bankrupts intended that the bond should be held by the bankers, as a security for any general balance that should become due to them;

but that the surety intended the bond to be a security only for the particular balance due to them at the date of the bond: Held, that the bond was, under these circumstances, proveable by the bankers against the separate estate of A. for the whole amount of the principal and interest secured by it. *Ex parte Walker, re Fidgeon*, 3 Dea. 672.

SURRENDER.

After twenty-three years contumacy, bankrupt allowed to surrender, such an order is almost of course. Court of Review will not appoint time, &c. for bankrupt to surrender; that is the office of commissioner. Where bankrupt allowed costs of surrender out of his estate. *Ex parte and re Tarleton*, Mont. & Chit. 677.

SUSPENSION OF DEBT.

See **DEBT, EXTINGUISHMENT OF, &c.**

1. A fiat founded on a bill due to a solicitor before taxation is good *primâ facie*, if afterwards on taxation it is reduced below 100*l.* Semble, the fiat will be superseded. *Ex parte and re Ford*, Mont. & Chit. 97.

2. Assignees being ordered by the commissioners to pay the solicitor's bill, that bill, though settled by them, may be taxed, and it is not to be treated as a settled account.

3. One assignee, stating himself to be also a creditor, may petition for this purpose, though the other assignees object to re-taxation. *Ex parte Fosbrooke, re Fisher*, Mont. & Chit. 290.

4. Upon a question of quantum of a petitioning creditor's debt, consisting of a bill of costs, the Court has no power to inquire into the

SUSPENSION OF DEBT— *continued.*

conduct of the solicitor in the proceedings out of which it arose, though alleged he had been guilty of gross neglect and misconduct. Ex parte, and re *Southall*, Mont. & Chit. 346.

5. Petition to supersede, charged that petitioning creditor's debt was composed of bill of costs of attorney in action. Petitioner contended, that through negligence cause was lost, and business useless, and that attorney agreed to take costs out of pocket only. (See *ante*, page 346.) Reference by consent to registrar to tax costs, having regard to question of negligence, and to ascertain what due, and state special circumstances: Held, he ought to have considered the contract, and to have taxed accordingly, and that the order of reference so taken by consent was no answer of the objection founded on the contract. Ex parte and re *Southall*, Mont. & Chit. 656.

TIME, COMPUTATION OF.

1. In computing the "two calendar months" under the 1 & 2 Vict. c. 110. s. 8. the day on which the affidavit of debt was filed must be included. Therefore, where affidavit was filed on the 27th April, and the fiat (though earlier in the day) issued on the 27th June, held, too late, and fiat annulled. Ex parte and re *Whitby*, Mont. & Chit. 671.

2. Where an act is required, by statute, to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. *The Queen against The Justices of Shropshire*, 8 Adol. & Ell. 173.

TIME TO ANSWER AFFIDAVITS.

Usual rule as to time to answer affidavits recently filed. Ex parte *Gaitskell*, re *King*, Mont. & Chit. 160.

TIME, ENLARGEMENT.

An application for enlarging the time for opening a town fiat, as the witness to prove the act of bankruptcy did not attend, refused. In re *Hilsdon*, Mont. & Chit. 74.

TRADER.

Semble, a party taking shares in a joint stock banking company merely in order to create a trading to found a fiat, cannot maintain the fiat on such a trading; but it would be sufficient to maintain it adversely against such party. Ex parte *Brundrett*, 3 Mont. & Ayr. 50. Ex parte and re *Hall*, Mont. & Chit. 365.

TRUST.

Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer and then dissolve the partnership; upon which occasion the two continuing partners give the executors a bond to secure the balance due to them; and more than six years afterwards the two become bankrupt: Held, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. Ex parte *Hall*, 3 Dea. 125.

TRUST DEEDS.

1. Quære, How far a debt is suspended at law by the subsistence of

TRUST DEEDS—*continued.*

a trust deed for the benefit of creditors, signed by the creditors, and still only in fieri, so as to become incapable of sustaining a fiat. *Ex parte* and *re Brown*, Mont. & Chit. 213.

2. C., a trader, on the 5th of June, 1838, assigned his effects in trust for the benefit of creditors. On the same day (but before the execution of the assignment) a fi. fa. against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on the 6th. The trustees under the assignment paid him the amount of the levy under protest, and he withdrew from possession. It afterwards appeared that C. had committed an act of bankruptcy on the 2d of June, upon which a fiat issued on the 18th: Held, that the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fact. *Harris v. Lloyd*, 5 Mees. & Wels. 432.

TRUSTEES.

1. Petition of three trustees to prove against a bankrupt, fourth, contained charges of breach of trust, and prayed consequential directions: Held, Court could only make the common order to prove. Assignees served entitled to costs of resisting the entire application. *Ex parte Smith*, *re Clark*, Mont. & Chit. 347.

2. Where, on petition to appoint trustee in place of bankrupt, usual reference is dispensed with, affidavit must be made of his fitness and respectability. *Ex parte Palmer*, *re Peach*, Mont. & Chit. 364.

3. If counsel undertake to say they consider trustees would not have acted safely without taking the opi-

nion of the Court: Semble, the Court will not give costs against them. *Ex parte Young*, *re Shanks*, Mont. & Chit. 599.

4. The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver. *Bainbridge v. Blair*, 1 Beavan, 495.

See also BANKRUPT TRUSTEE.

UNCLAIMED DIVIDENDS.

Unclaimed dividends in hands of executor of surviving assignee ordered into Court; but new assignees must be appointed before the executor will be released. *Ex parte Raikes*, *re Tuke*, Mont. & Chit. 96.

USURY.

1. A. applies to B. for a loan on mortgage; B. lends the amount on a three months' bill, renewable, A. verbally agreeing to pay 10½ per cent. interest. The bill becomes due, but was not renewed for three weeks after, when another was accepted at three months' date, at a like rate of interest for the three months, and three weeks; and five renewals were made in the same way: Held, that the transaction was usurious, and not within the protection of the 3 & 4 W. 4. c. 98. s. 7. *Ex parte Terrewest*, *re Poynter*, Mont. & Chit. 146.

2. More than 5 per cent. taken on a renewed bill, the original loan being on bills renewable at the option of the lender, although there was a contract not to renew for more than eighteen months, is a transaction protected by 3 & 4 W. 4. c. 98. s. 7. — Order of the Court of Review reversed. S. S. Mont. & Chit. 351.

USURY—*continued.*

3. A loan of money at more than five per cent. upon the security of a deposit of a lease, a warrant of attorney, and a promissory note, is not protected by 3 & 4 W. 4. c. 98. s. 7. *Berrington v. Collis*, 5 Bing. N. C. 332. S. C. 7 Scott, 302.

VARYING MINUTES.

See ORDER, 2.

VIVA VOCE EXAMINATION.

1. Practice as to vivâ voce examinations not granted merely where a witness, having previously given information, refuses to make affidavit, because affidavit as to information by A. B. and belief lets in facts, unless contradicted by A. B. Ex parte *Goodbody*, re *Freeman*, Mont. & Chit. 283.

2. On a petition by the bankrupt to annul the fiat for want of the proper requisites, where the affidavits are diametrically opposite as to the facts, the Court will direct either a vivâ voce examination, or an issue; which, if taken by the bankrupt, will be under his liability to the costs. Ex parte *Bunn*, 3 Dea. 120.

VOLUNTARY CONVEYANCE.

1. When a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor in pursuance of a bonâ fide demand by the creditor, it is not voluntary within the meaning of the 7 G. 4. c. 57. s. 32.: it is not necessary, in order to support it, that there should have been pressure on the part of the creditor, or an apprehension on the part of the insolvent that by not

making it he should be in a worse condition. *Mogg v. Baker*, 4 Mees. & Wels. 348.

2. Where a person in insolvent circumstances, being pressed by particular creditors, employed an attorney to endeavour to effect an arrangement with all his creditors, but that failing, the attorney advised that his goods should be sold by auction, and that he should go through the Insolvent Debtors' Court, in order that his effects might be rateably divided amongst his creditors; and the goods were sold accordingly, and the proceeds were, with the insolvent's assent, paid over by the auctioneer to the attorney, who (after making several payments to and on account of the insolvent) retained against the assignees the whole amount of his bill, for the business done for the insolvent: Held, that this was not a voluntary transfer or delivery of that sum by the insolvent to the attorney, within the 7 G. 4. c. 57. s. 32., there being no proof that it was intended that he should hold the proceeds for his own benefit, or for the benefit of any particular creditors, or otherwise than as the agent of the insolvent. *Wainwright v. Clement*, 4 Mees. & Wels. 385.

3. B. being in insolvent circumstances, and having several executions in his house, to satisfy which all his goods must have been sold, at the suggestion of one of the execution creditors, assigned to him all his effects, in trust for the general benefit of his creditors who should come in and sign the deed. The deed recited that B. "had proposed" to execute such assignment. The assignee paid the sheriff's officer the amount of the executions, and he withdrew from possession. Several of the execution creditors

VOLUNTARY CONVEYANCE— *continued.*

signed the deed. Within three months after the assignment, B. went to prison, and subsequently was discharged under the Insolvent Act: Held, that the assignment was not voluntary, within the meaning of the 7 G. 4. c. 57. s. 32. *Knight v. Fergusson*, 5 Mees. & Wels. 389.

WAIVER OF NOTICE.

Under 1 & 2 Vict. c. 110. s. 8.

B. and P. (the petitioners) carried on business as cotton-spinners, under the firm of B. and P., at the Grove Mills, and becoming embarrassed, applied to the M. and T. district banking company for an advance; and it was arranged by a deed, dated 22d August, 1837, that the banking company should take the management of the concern into their hands, by means of J., their manager, under the firm of the "Grove Mills Company;" that B. and P. should conduct the business as employees of the banking company, at a salary; that the banking company should pay all debts, and repay themselves out of the profits; and that if they chose finally to wind up and close the concern, they should give B. and P. a full release and discharge from all debts then or to become due. Under this arrangement, the affairs are carried on until the 3d October, 1838, when notice is given to B. and P. that the company intend to close the concern; and at the same time J., the manager, intimates to B. and P. that they will probably receive a notice from the company, pursuant to the 1 & 2 Vict. c. 110. s. 8., but that it would be a mere matter of form,

and that they need be under no apprehension concerning it.

On the 22d October following, J., as manager, swore an affidavit of debt, pursuant to the above act, and on the 25th served the requisite notice on B. and P. The affairs having been wound up, B. and P. claimed a release, pursuant to the deed of August, 1837, and on the 6th November filed a bill in Chancery, praying to be declared so entitled. A negotiation for a compromise of the suit was then entered into, and a memorandum of agreement, dated 19th November, was executed, by which B. and P. were to give up to the banking company all they had in the world, on condition that the company should release them from all their claims, and discharge their debts; and it was provided that a clause should be inserted in the deed, making void the release, if B. and P. concealed or withheld any of their property. The proceedings in Chancery are altogether discontinued, and the respective solicitors of the parties proceeded to prepare the last-mentioned deed, and the release to B. and P.; and the banking company continued to deal with the property till the 30th November, 1838. On the 15th November, the twenty-one days after the notice provided by the statute expired. On the 30th November, the solicitors for the banking company wrote to the solicitors of B. and P., saying, "that disclosures of improper acts by B. and P. had been made within the last three days, and that further proceedings with the proposed deeds should be stayed for the present," but still appearing to invite explanation. On the same day docket papers are prepared, and on the 1st December a docket was struck; on the 3d, the fiat was is-

WAIVER OF NOTICE—
continued.

sued, which was opened on the 6th : Held, that no act of bankruptcy was committed, because, under the above circumstances, the banking company were to be considered as consenting to the default of payment beyond the twenty-one days, and that they had accepted security pro. tem. at and prior to the twenty-second day, so as to satisfy the notice given under the statute. The fiat was superseded with costs. *Ex parte and re Brown, Mont. & Chit. 177.*

WARRANT OF ATTORNEY.

A defendant may apply to set aside a warrant of attorney, and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110. s. 9., although he have become bankrupt since the execution of it. *Taylor v. Nicholls, 6 Mees. & Wels. 91.*

WITNESS, COMPETENCY OF.

1. The affidavit (dated 22d April, 1839) under the Abolition of Arrest Act, 1 & 2 Vict. c. 110. s. 8., was of a debt of "100*l.* and upwards," on bills of exchange as due to A., the "deponent, and B. and C. his late partners." The notice and requisition to pay (dated the 24th April) was in respect of a debt of 361*l.*, but intended as the same and the real debt, and was signed by A. for B. and C. and himself. On the 24th April, A. filed another affidavit, swearing the debt to be 361*l.* "upon bills of exchange," and on the 2d May, A. and B. for themselves and C. gave a corresponding notice. The commissioners approved

a bond for 200*l.* as security under the first affidavit, although he had notice that the real debt was the 361*l.* On the 3d June, A., B., and C. issued a fiat on the alleged act of bankruptcy, by not having given security under the second affidavit, and notice. The affidavit also stated the debt to be "justly due," instead of following the words of the eighth section, which uses the words "justly and truly indebted." The alleged act of bankruptcy was also proved by the solicitor to the fiat; and the petitioning creditor's affidavit, on striking the docket, stated the debt to be due, "for goods sold and delivered:" Held, there were not sufficient objections to warrant the staying the advertisement in the Gazette. And upon the question of supersedeas, *quære*, whether these, or any of them are sufficient grounds for superseding. Per Sir G. Rose. The proof of the act of bankruptcy by the solicitor to the fiat is sufficiently bad to induce the Court to send the question to be tried by action at law. *Ex parte and re Rhodes, Mont. & Chit. 319.*

2. Objection as to proof of requisites of fiat by a creditor relaxed. *Ex parte and re Hall, Mont. & Chit. 447.*

3. A creditor of a bankrupt's estate who has sold his debt, is a competent witness in support of the fiat. *Pulling v. Meredith, 8 Car. & P. 763.*

4. In an action by the assignees of a bankrupt for money had and received, against a sheriff who has sold the goods of the bankrupt under an execution, and paid over the proceeds after notice of an alleged act of bankruptcy; the sheriff's officer who acted in the execution (if he has given the usual indemnity bond to the sheriff) is not a competent

WITNESS, COMPETENCY OF
—continued.

witness for the defendant under the statute 3 & 4 W. 4. c. 42. s. 26. *Groom v. Bradley*, 8 Car. & P. 500.

5. The wife of an uncertificated bankrupt is not a competent witness, in an action by the assignees, to prove payment by the bankrupt to the defendant after bankruptcy. *Williams v. Williams*, 8 Dowl. Pr. Ca. 220.

6. In a suit by the assignee under the Insolvent Debtors' Act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff; and he is not rendered competent by the 3 & 4 W. 4. c. 42. ss. 26, 27. *Holden v. Hearn*, 1 Beavan, 445.

7. A. and B. were co-partners. A. retired, and B. took C. into partnership with him. That partnership was dissolved, and then B. became bankrupt: Held, that B. was not a good witness to prove an

agreement alleged by A. to have been made with him by B. and C. to indemnify against the debts of the first partnership. *Warren v. Taylor*, 8 Sim. 599.

See also BANKRUPT GENERALLY.

WORDS, COPY OF.

For the purpose of determining whether a fiat issued within the two months mentioned in the 6 G. 4. c. 16. s. 6., the date of it is *prima facie* evidence of the day of its "issuing," although it was shewn not to have been delivered out by the Lord Chancellor's officer till the day after its date. Semble, "issuing," and "suing forth," in the 6 G. 4. c. 16. s. 6. mean, "applying for" a fiat, per C. R. and T. C. *Ex parte* and re *Rowe*, Mont. & Chit. 334.

WRIT OF PROCEDENDO.

See PROCEDENDO.

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